TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 344.

RUSSO-CHINESE BANK, PETITIONER,

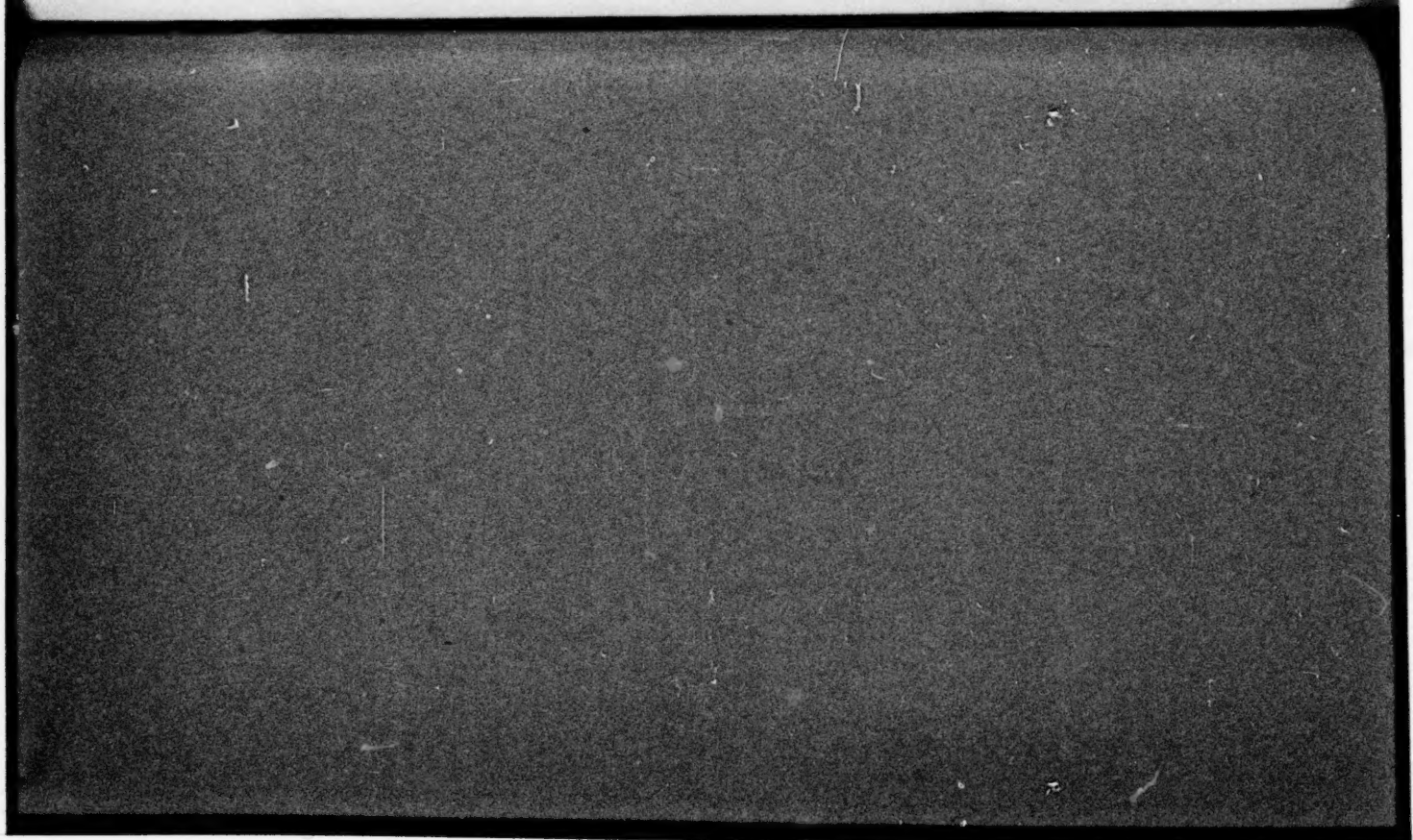
vs.

THE NATIONAL BANK OF COMMERCE OF SEATTLE, WASHINGTON.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

PETITION FOR CERTIORARI FILED SEPTEMBER 8, 1914.
CERTIORARI AND RETURN FILED NOVEMBER 11, 1914.

(24,264)



(24,364)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 244.

RUSSO-CHINESE BANK, PETITIONER,

vs.

THE NATIONAL BANK OF COMMERCE OF SEATTLE, WASHINGTON.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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a Original.

No. —.

RUSSO-CHINESE BANK (a Corporation), Plaintiff in Error,
vs.
THE NATIONAL BANK OF COMMERCE OF SEATTLE, WASHINGTON,
Defendant in Error.

TRANSCRIPT OF RECORD.

Upon Writ of Error to the United States District Court for the Western District of Washington, Northern Division.

1 Original.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

No. 1517.

RUSSO-CHINESE BANK (a Corporation), Plaintiff in Error,
vs.
NATIONAL BANK OF COMMERCE OF SEATTLE, Defendant in Error.

Names and Addresses of Counsel.

T. L. Stiles, Esq., Fidelity Bldg., Tacoma, Washington.
Messrs. Chickering & Gregory, of Counsel, San Francisco, Cal., and Dorr & Hadley, of Seattle. Attorneys for Plaintiff in Error.
G. E. de Steiguer, Esq., New York Bldg., Seattle, Washington.
Messrs. Kerr & McCord, Hoge Bldg., Seattle, Washington, Attorneys for Defendant in Error.

2 *Complaint.*

In the United States Circuit Court, Western District of Washington, Northern Division.

No. 1517.

RUSSO-CHINESE BANK (a Corporation), Plaintiff,
vs.
NATIONAL BANK OF COMMERCE OF SEATTLE, Defendant.

Now comes the above-named plaintiff and complains of the above-named defendant, and for cause of action alleges:

I.

That the plaintiff at all the times hereinafter mentioned was, and it now is, a banking corporation organized and existing under the

laws of the Empire of Russia, and had, and now has, its principal place of business at St. Petersburg, Russia, and had in the years 1903 and 1904, a branch bank at Port Arthur in the Empire of China.

II.

That the defendant, at all the times hereinafter mentioned, was, and it now is, a corporation organized under the national banking laws of the United States, and had and now has its place of business at Seattle, King County, Washington.

III.

That on or about the 11th day of December, 1903, the defendant remitted to plaintiff's branch bank at Port Arthur, China, a certain draft in writing, drawn by the Centennial Mill Company upon Clarkson & Co., at Port Arthur, China, requiring said Clarkson & Co. to pay, ninety days after date, to the holders of said draft the sum of thirty-six thousand one hundred and ninety-four dollars and eighty cents, with interest from date of acceptance at six per
3 cent per annum, exchange and collection fees. Said draft was duly endorsed so as to authorize plaintiff's said branch bank to collect the same, and was remitted to plaintiff's said branch bank for collection, and remittance of the proceeds thereof to defendant, at Seattle, Washington.

IV.

That said draft was duly received by plaintiff's said branch bank at Port Arthur, China, on or about the 18th day of January, 1904, and was, by said branch bank, presented to said Clarkson at Port Arthur, on the 30th day of January, 1904, and was then and there accepted by said Clarkson and his acceptance duly written thereon.

V.

That said draft became due and payable ninety days after said acceptance on the 30th day of January, 1904, which was the 30th day of April, 1904; but that by the law of Russia then in effect in commercial transactions in said city of Port Arthur, and by the custom of merchants and bankers therein, the acceptor of a foreign draft was entitled to two days' grace for the payment of said draft, after the due date thereof, excluding Sundays, and whereas, the said 30th day of April, 1904, fell upon Saturday, the said Clarkson Co. was entitled to and including the 2d day of May, 1904, in which to pay said drift.

VI.

That said draft was not paid by said Clarkson & Co. on said 2d day of May, 1904, or at all; and thereupon plaintiff's said branch bank caused said draft to be duly protested for non-payment by the Notary of said city of Port Arthur.

VII.

That at all the times mentioned in 1903 and 1904, the Empire of Russia and the Empire of Japan were at war, and said Port Arthur, China, was on or about the 4th day of May, 1904, completely invested and surrounded by hostile troops of Japan engaged in said war, so that from said 4th day of May, 1904, for a long time,
4 said Port Arthur and the inhabitants thereof, and the plaintiff's said branch bank were compelled to suspend all ordinary business transactions, and were unable to receive or send out any communication by mail, whereby plaintiff's said branch bank was unable to mail to defendant any advise of the non-payment of said draft, or to return said draft and the protest thereof to defendant until on or about the 26th day of May, 1904.

VIII.

That on or about the 26th day of May, 1904, plaintiff's said branch bank at Port Arthur did mail to defendant, at Seattle, Washington, notice of the non-payment of said draft, together with the said draft, and the official protest of the said notary thereof.

IX.

That thereafter and on or about the first day of January, 1904, the said Port Arthur was captured by the armies of Japan, engaged in said war, and the armies of Japan took possession of plaintiff's said branch bank, and took from plaintiff's agents in charge thereof, all of the books, records, and papers of said branch bank, including all of its books, records and papers having reference to said draft and retained the same, so that plaintiff had no access thereto, or knowledge of the contents thereof, for the space of more than one year.

X.

That while said books, records and papers of plaintiff's said branch bank at Port Arthur were thus in the possession of the said armed forces of Japan, and before they had been recovered by plaintiff, defendant represented and claimed to plaintiff that said draft had never been returned to defendant and that it had been paid in full to plaintiff's said branch bank at Port Arthur, and that the proceeds of said draft and the money paid thereon by said Clarkson & Co., had been retained by plaintiff's said branch bank, and demanded from plaintiff the payment to it of the full amount of said draft, and threatened to sue plaintiff in the courts of the United States, where plaintiff had property subject to levy and sale, if the same should not be forthwith paid.

5

XI.

That thereupon and on the 9th day of November, 1904, plaintiff being without information as to the payment on non-payment of said draft, and without means of information thereof, and to avoid the said threatened suit, and to keep unstained its honor as a bank, paid

to defendant the sum of thirty-six thousand and thirteen dollars and seventy cents, upon condition, nevertheless, that if it should thereafter be ascertained that said draft had not been paid, the said sum should be repaid to it by defendant, to which condition defendant assented and agreed in writing.

XII.

That thereafter and on or about the 5th day of December, 1904, defendant also demanded of plaintiff that it further pay to defendant the sum of two thousand two hundred and ninety-eight dollars and forty-nine cents, as interest on said draft from the date of its acceptance by said Clarkson & Co. to the 9th day of November, 1904, when plaintiff paid to it said sum of $36,113.70; and that thereupon plaintiff did pay to defendant, on the 29th day of December, 1904, the further sum of $2,298.49, under like conditions as to repayment, as were made and agreed to by defendant upon the payment to it of said sum of $36,113.70.

XIII.

That subsequent to said payments plaintiff recovered the books, records and papers of its said branch bank at Port Arthur, and the books, records and papers covering said draft, from the said armed forces of Japan, and then first obtained certain information that said draft had not been paid by said Clarkson, or at all, but that it had been duly protested for non-payment and returned, with the official protest, to defendant; and thereupon plaintiff demanded from defendant the payment to it of the said sums of $36,113.70 and $2,298.49; but defendant has wholly failed, neglected and refused to pay said sums, or either of them, or any part thereof to plaintiff, and the whole thereof is now due, owing and unpaid.

Whereof, plaintiff prays judgment against defendant for the said sum of $36,113.70 with interest thereon at the lawful rate
6 from the 9th day of November, 1904, and for the further sum of $2,298.49 with interest thereon at the lawful rate from the 16th day of December, 1904, and for its costs and disbursements herein.

T. L. STILES,
Attorney for Plaintiff.
CHICKERING & GREGORY,
Of Counsel.

STATE OF WASHINGTON,
County of Pierce, ss:

T. L. Stiles, having been first duly sworn on oath says: That he is attorney for the plaintiff in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof, and he believes the same to be true; and affiant further says that he makes this verification on behalf of plaintiff for the reason that neither the plaintiff, which is a corporation, nor any of its officers, are at the date hereof, within the State of Washington.

T. L. STILES.

Subscribed and sworn to before me this 19th day of April, 1908.

[SEAL.] EUGENE CARR,
Notary Public, Pierce County, Washington,
Residing at Tacoma.

Endorsed: Complaint. Filed in the U. S. Circuit Court, Western Dist. of Washington. Apr. 20, 1907. A. Reeves Ayres, Clerk. W. D. Covington, Dep.

7 In the Circuit Court of the United States for the Western District of Washington, Northern Division.

No. 1517.

RUSSO-CHINESE BANK (a Corporation), Plaintiff,
vs.
NATIONAL BANK OF COMMERCE OF SEATTLE, Defendant.

Amended Answer.

Comes now the defendant above named, and with leave of Court first had and obtained, files this, its amended answer to plaintiff's complaint, and for cause of answer alleges:

I.

Answering the first paragraph of said complaint, this defendant says it has neither knowledge or information sufficient to form a belief as to the truth or falsity of the matters and things therein stated, and therefore denies the same and each and every part thereof.

II.

Answering the second paragraph of said complaint, this defendant admits the same.

III.

Answering the third paragraph of said complaint, this defendant admits that on or about the 11th day of December, 1903, the defendant remitted to the plaintiff's branch bank at Port Arthur, China, a certain draft in writing, drawn by the Centennial Mill Company upon Clarkson & Company for $36,194.80 in gold, together with interest from date at 6% per annum, with exchange and collection fees and that said draft was duly endorsed so as to authorize plaintiff's said branch bank to collect the same, and that same was
8 remitted to plaintiff's said branch bank for collection and remittance of the proceeds thereof to the defendant at Seattle, Washington. Defendant denies that said draft was to bear interest from the date of acceptance, but alleges that it was to bear interest from the date of the draft; that said draft, with the endorsements thereon, was substantially as follows:

"Exch. for G. $36,104.80.

SEATTLE, WASHINGTON, December 11th, 1903.

Ninety (90) days after sight of this First — of Exchange (Second unpaid) pay to the order of The National Bank of Commerce thirty-six thousand one hundred ninety-four & 80/100 Dollars with exchange and collection charges, value received, and charge the same to account of

CENTENNIAL MILL COMPANY,
By M. THOMSEN, *President.*

Gold.
1 To Clarkson & Company, Port Arthur, China.
No. 1559.

Payable at the Bank's demand rate of exchange on New York at due rate, together with interest at six per cent per annum from date of this bill to estimated date of return of remittance in Seattle, Washington.

Pay Banque Russo Chinoise or order
THE NATIONAL BANK COMMERCE,
Seattle, Washington.
By R. R. SPENCER, *Cashier.*"

IV.

Answering the fourth paragraph of said complaint, this defendant admits that said draft was duly received by plaintiff's said branch bank at Port Arthur, China, but as to whether same was received by said branch bank on or about the 18th day of January, this defendant has neither knowledge nor information sufficient to form a belief, and therefore denies the same; and in this connection says, that in the ordinary course of business said draft should have been received by the plaintiff on or about the 10th day of January, 1904,
9 and therefore alleges that it was received on January 10th, 1904.

Further answering said paragraph, this defendant admits that said draft was not presented to Clarkson & Company at Port Arthur, China, prior to the 30th day of January, 1904; but as to whether said draft was accepted by said Clarkson & Company and their acceptance written thereon, this defendant has neither knowledge nor information sufficient to form a belief and therefore denies the same.

V.

Answering the fifth paragraph of said complaint, this defendant says that it has neither knowledge nor information sufficient to form a belief as to the truth or falsity of the matters and things therein set forth, and therefore denies the same and each and every part thereof.

VI.

Answering the sixth paragraph of said complaint, this defendant denies the same and each and every part thereof.

VII.

Answering the seventh paragraph of said complaint, this defendant admits that during a portion of the year 1904 the Empire of Russia and the Empire of Japan were at war. Further answering said paragraph, this defendant says it has neither knowledge nor information sufficient to form a belief as to the matters and things therein stated, and therefore denies the same and each and every part thereof, and specifically denies that said draft and the protest thereof, or either of them, were returned to the defendant on the 26th day of May, 1904, or at all; and in this connection alleges that said draft and said alleged protest thereof were never returned by plaintiff to this defendant.

VIII.

Answering the eighth paragraph of said complaint, this defendant denies the same and each and every part thereof.

10

IX.

Answering the ninth paragraph of said complaint, this defendant says it has neither knowledge nor information sufficient to form a belief as to the truth or falsity of the matters and things therein stated, and therefore denies the same and each and every part thereof.

X.

Answering the tenth paragraph of said complaint, this defendant admits that it represented to the plaintiff that said draft had never been returned to defendant and that it was informed that the same had been paid in full to plaintiff's said branch bank at Port Arthur, China; admits that it demanded from plaintiff payment to the defendant of the full amount of said draft, and admits that it threatened to sue plaintiff in the courts of the United States if the same should not be paid. Defendant denies that the books, records and papers of the plaintiff's said branch bank at Port Arthur were, at the times mentioned in said paragraph in the possession of the armed forces of Japan.

XI.

Answering the eleventh paragraph of said complaint, this defendant denies that on the 9th day of November, 1904, or at any other time plaintiff was without information as to the payment or nonpayment of said draft, or any part thereof, and denies that plaintiff at said times in said paragraph XI mentioned, or at any other time was without means of information thereof, and denies that plaintiff was at any time without information thereof. Defendant denies that said payment was made to avoid a threatened suit; admits that plaintiff paid to the defendant the sum of $36,113.70, but denies that said payment was made to keep unstained its honor as a bank. Defendant denies that said payment was made upon the condition that if it should thereafter be ascertained that said draft had not been paid, the said sum should be repaid to it by the defendant.

and denies that the defendant agreed or assented in writing, or at all, to any such condition as stated in said paragraph XI; and in this connection alleges: That the defendant agreed upon its
11 part, upon the return to the defendant of both sets of bills and a showing that the said draft had not been paid, to reimburse the plaintiff for the sum paid to the defendant, provided that said defendant was in no wise injured by the negligence of the plaintiff in connection with the collection of said draft or in the performance of its duties, or in the handling of said draft, or the documents connected therewith; and alleges that no showing of nonpayment of said draft has ever been made by the plaintiff to the defendant; and further alleges that both sets of bills have not been returned to the defendant, and that neither set of bills or any bill at all has ever been returned to this defendant by the plaintiff covering the transaction referred to in said paragraph XI; and alleges that the plaintiff has never fulfilled or performed the said conditions agreed upon by the plaintiff and the defendant at the time the said payment of $36,113.70 was made.

XII.

Answering the twelfth paragraph of said complaint, this defendant admits that upon the payment, on or about the 9th of November, 1904, of the said sum of $36,113.70, the defendant demanded the payment of the further sum of $2,298.49 on account of the interest upon said draft, and alleges that the same was paid by the plaintiff to the defendant under like conditions and under like agreement on the part of the defendant for the reimbursement of the plaintiff as stated in the foregoing answer of the defendant to the eleventh paragraph of plaintiff's complaint.

XIII.

Answering the thirteenth paragraph of said complaint, this defendant admits that prior to the commencement of this action, plaintiff demanded from the defendant the repayment to it of the sum of $36,113.70 and the further sum of $2,298.49; admits that defendant has refused to pay the plaintiff the said sums or either of them or any part thereof. Defendant denies that subsequent to said payment, or at any other time, the plaintiff recovered the books, papers and records of its said branch bank at Port Arthur, China, or the
12 books, papers and records covering said draft from said armed forces of Japan; and in this connection alleges that all of the books, papers and records of said branch bank at Port Arthur, and all the books, papers and records covering draft were at all times under the control of the plaintiff, and that the same were never under the control of the armed forces of Japan, or under the control of the Japanese. Defendant further denies that said draft was duly protested for non-payment or protested at all for non-payment, and denies that said draft was ever returned to this defendant with said protest and denies that said draft was ever returned at all to this defendant. Defendant denies that the plaintiff ever received any in-

formation whatsoever that the said draft had not been paid by Clarkson & Company, and alleges that said draft was paid by Clarkson & Company to the plaintiff's branch bank at Port Arthur, and that such fact was at all times well known to the plaintiff.

For a further and first affirmative defense to plaintiff's complaint, this defendant alleges, that on or about December 11th, 1903, Centennial Mill Company, a corporation, drew a certain draft for $36,194.80, payable in gold, upon Clarkson & Company at Port Arthur, China, payable to the order of the defendant, and that the said draft was duly endorsed by the said defendant to the order of the plaintiff and forwarded by the defendant in the ordinary course of business to the plaintiff at Port Arthur, China, which said draft is set forth in hæc verba in the foregoing answer of the defendant, which is hereby referred to and made a part of this affirmative defense, and that thereafter said draft was paid in full by Clarkson & Company to the plaintiff and that the plaintiff received from the said Clarkson & Company payment in full for said draft.

For a second and further affirmative defense, this defendant alleges that said draft, hereinbefore set forth, dated December 11th, 1903, was drawn by the Centennial Mill Company upon Clarkson & Company at Port Arthur, China, to cover the purchase price of thirty-six thousand three hundred and twelve (36,312) sacks of flour shipped on or about December 11th, 1903, by Centennial
13 Mill Company from Seattle, Washington, to Port Arthur, China, on the steamer "Hyades" a steamship operated by the Boston Steamship Company and the Boston Towboat Company; that the said flour was delivered to the said steamer and a bill of lading was issued therefor by the said Boston Steamship Company and Boston Towboat Company about December 11th, 1903, to Centennial Mill Company, the Centennial Mill Company being named both consignor and consignee in said bill of lading; that the said bill of lading, with insurance papers and other documents, were assigned to the defendant and attached to the draft and that said draft was accompanied by said bill of lading and documents when the same was endorsed and assigned by the defendant to the plaintiff at Port Arthur, China, and the plaintiff was instructed by the defendant to deliver the said bill of lading and documents to Clarkson & Company at Port Arthur, China, upon the payment of the said draft.

That by reason of the assignment of said draft and said documents by the defendant to the plaintiff, it became the duty of the plaintiff under the custom among bankers at Oriental ports, including the port of Port Arthur, China, and under the law merchant, to present said draft for acceptance upon its arrival; that the plaintiff did not present said draft for acceptance upon the day of its arrival or the succeeding day, and did not present the draft for acceptance for several weeks thereafter, after an unreasonable delay; that it also became the duty of the plaintiff, under the custom of bankers, as above stated, to look after, protect and care for the flour represented by the bill of lading upon its arrival at Port Arthur; that it was the duty of said plaintiff to warehouse the said flour and to insure the same, and that it became *to* the duty of the plaintiff, by reason of the in-

structions given to plaintiff by the defendant, and by reason of the custom among bankers, not to permit the said flour represented by said bill of lading to be appropriated by Clarkson & Company or anyone else.

That the plaintiff claims said flour represented by said bill of lading was appropriated by Clarkson & Company to their own use and the proceeds of the same were not applied to the payment of said debt or any part thereof.

14 The defendant further alleges that if the proceeds of the sale of said flour were not used and applied toward the payment of said draft, the failure to have the same applied toward the payment of said draft was due to the carelessness and negligence of the plaintiff and was due to a breach of duty that the plaintiff owed to the defendant to cause the said flour or the proceeds thereof to be utilized for the payment of said draft, and that any failure to have the proceeds of said flour applied to the payment of said draft, if said proceeds were not so applied, was due to the gross carelessness and negligence on the part of the plaintiff, for which this defendant is in no wise responsible; that the plaintiff did not protest said draft at the date of its maturity, as required by the law merchant and did not return the draft and the documents accompanying same, all without excuse or reason, and indefinitely held the same to the great injury and damage of this defendant, all of which was a gross breach of the duty owed by the plaintiff to the defendant as hereinabove stated.

Wherefore, defendant prays that it may be dismissed hence with its costs and disbursements in this action expended.

KERR & McCORD,
Attorneys for Defendant.

STATE OF WASHINGTON,
County of King, ss:

Ralph S. Stacy, being first duly sworn, upon oath deposes and says: That he is the Vice-President of The National Bank of Commerce, the defendant in the above-entitled action; that he has read the foregoing Amended Answer, knows the contents thereof, and believes the same to be true.

RALPH S. STACY.

Subscribed and sworn to before me this the 16th day of October, A. D. 1907.

[SEAL.]

LEROY V. NEWCOMB,
Notary Public in and for the State of Washington, Residing at Seattle.

Endorsed: Amended Answer. Filed in the U. S. Circuit Court, Western Dist. of Washington. Oct. 16, 1907. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

15 In the Circuit Court of the United States for the Western District of Washington, Northern Division.

No. 1517.

RUSSO-CHINESE BANK (a Corporation), Plaintiff,
vs.
NATIONAL BANK OF COMMERCE OF SEATTLE, Defendant.

Reply.

Now comes the above-named plaintiff, and replies to the Amended Answer of the defendant herein, as follows:

I.

Denies that defendant's agreement to repay to plaintiff the said sums of $36,113.70 and $2,298.49, was conditioned upon the return of both sets of bills, and a showing that the said draft had not been paid, or that defendant was in no wise injured by the negligence of plaintiff in connection with the collection of said draft, or in the performance of its duties or in the handling of said draft, or the documents connected therewith; and denies that no showing of the non-payment of said draft has ever been made by plaintiff to defendant, and alleges to the contrary that it has frequently made such showing;

II.

Plaintiff denies each and every allegation contained in defendant's second and further affirmative defense commencing at line 26, on page 7 of said Amended Answer, and continuing to the end of said affirmative defense.

And for a further and affirmative reply to the defendant's said second and further affirmative defense, plaintiff alleges:

I.

That the said transaction was, in fact a shipment of said flour, by said Centennial Mill Company to said Clarkson & Com-
16 pany for sale, and that said Clarkson & Company was the agent of the said Boston Towboat Company and Boston Steamship Company, at Port Arthur, for the landing and storage of goods shipped on board of said steamship "Hyades"; and that said Centennial Milling Company and defendant well knew that upon the arrival of said steamship "Hyades" at Port Arthur, said flour would be delivered from said steamship into the keeping and possession of said Clarkson & Company, as such agent, whether said draft was paid or not, and that whether said Clarkson & Company would thereafter appropriate said flour, before payment of said draft, was entirely at the discretion of said Clarkson & Company, and was not within the control of this plaintiff.

Wherefore plaintiff having fully replied to defendant's answers, prays as in its complaint herein.

T. L. STILES,
Attorney for Plaintiff.

CHICKERING & GREGORY,
Of Counsel.

STATE OF WASHINGTON,
County of Pierce, ss:

T. L. Stiles being first duly sworn, on oath deposes and says: That he is the attorney for the plaintiff in the above-entitled action; that he has read the foregoing reply and knows the contents thereof, and that he believes the same to be true. Defendant corporation has no officer or agent within the District of Washington at the date hereof.

T. L. STILES.

Subscribed and sworn to before me this 31st day of October, 1907.

[SEAL.] ANTHONY M. ARNSTON,
Notary Public for Washington,
Residing at Tacoma, Pierce County.

STATE OF WASHINGTON,
County of Pierce, ss:

T. L. Stiles, having been first duly sworn, on his oath says: I am the attorney for the plaintiff in the above-entitled action.
17 On the 31st day of October, 1907, I served the within reply upon the defendant's attorneys, Messrs. Kerr & McCord, by mailing to them a true copy of said reply enclosed in a sealed envelope postage prepaid deposited in the United States Postoffice, at Tacoma, in said District, and addressed to Kerr & McCord, Mutual Life Building, Seattle, King County, Washington.

T. L. STILES.

Subscribed and sworn to before me this 31st day of October, 1907.

[SEAL.] ANTHONY M. ARNSTON,
Notary Public for Washington.
Residing at Tacoma, Pierce County.

Endorsed: Reply. Filed in the U. S. Circuit Court, Western Dist. of Washington. Nov. 1, 1907. A. Reeves Ayres, Clerk. R. M. Hopkins, Dep.

COPY BOUND TO

In the United States District Court for the Western District of Washington, Northern Division.

No. 1517.

RUSSO-CHINESE BANK, a Corporation, Plaintiff,
vs.
THE NATIONAL BANK OF COMMERCE OF SEATTLE, a Corporation, Defendant.

Judgment.

This action came on regularly for trial. Said parties appeared by their attorneys, T. L. Stiles, C. W. Dorr and Chickering & Gregory appearing for the plaintiff and Kerr & McCord appearing for the defendant.

A jury of twelve persons was regularly impanelled and sworn to try said action. Witnesses on the part of the plaintiff and the defendant were sworn and examined.

18 After hearing the evidence, arguments of counsel and instructions of the Court the jury retired to consider of their verdict, and subsequently returned into Court with a verdict, which said verdict consisted of a special verdict and a general verdict. The special verdict, omitting the caption, was in the words and figures as follows, to-wit:

"We, the jury in the above-entitled action, do find for the defendant. Charles Osner, Foreman."

The special verdict, omitting the caption, was in words and figures following, to-wit:

"We, the jury in the above-entitled cause, find that the Port Arthur Branch of the Russo-Chinese Bank did receive payment for the draft dated December 11th, 1903, on account of which the plaintiff made the remittance to the defendant alleged in the complaint. Charles Osner, Foreman."

Wherefore, by virtue of the law and by reason of the premises aforesaid, it is by the Court

Ordered, adjudged and decreed, That the plaintiff take nothing by its complaint and that the defendant National Bank of Commerce of Seattle, do have and recover of and from the plaintiff, Russo-Chinese Bank, judgment for its costs and disbursements in this action expended, amounting to the sum of One Hundred and 30/100 Dollars ($100.30).

Done in open court this the 18th day of June, A. D. 1912.

C. H. HANFORD, *Judge.*

Indorsed: Judgment. Filed in the U. S. District Court, Western Dist. of Washington. June 18, 1912. A. W. Engle, Clerk. By S., Deputy.

CLOSE IN CENTER

19 In the District Court of the United States for the Western District of Washington, Northern Division.

Circuit No. 1517.

RUSSO-CHINESE BANK (a Corporation), Plaintiff,
vs.
NATIONAL BANK OF COMMERCE OF SEATTLE.

Plaintiff's Bill of Exceptions.

Be it remembered that on the 23rd day of February, 1912, the above-entitled cause came on for trial before the above-named court and a jury duly empanelled. Honorable C. H. Hanford, District Judge, presiding; the plaintiff appeared by Messrs. T. L. Stiles, Warren Gregory and C. W. Dorr, its counsel, and the defendant appeared by E. C. McCord, and the following proceedings were had:

Mr. Gregory made an opening statement to the jury on behalf of the plaintiff.

It was agreed between counsel that the corporate character of the Russo-Chinese Bank and the defendant should be taken as admitted.

Thereupon the plaintiff read in evidence the deposition of Alexander Friedberg, taken and certified before the Honorable James W. Ragsdale, United States Con-ul at St. Petersburg, Russia, and certified by him in his official capacity, as follows:

Interrogatory 1. State your name, age, residence and occupation.

Answer. Name, Alexander Friedberg, thirty-one years old, officer of the Russo-Chinese Bank, St. Petersburg, holding power of attorney.

And he further said: I resided from January 1/14, 1904, till July 17/30, 1904, in Port Arthur; on the last date I left Port Arthur for Chefoo, China, where I resided until the close of that year. While I was in Port Arthur I was an officer of the Russo-Chinese Bank,
holding a power of attorney for the Port Arthur and Dalny
20 branches of the bank, and my duty was to supervise the affairs of the above-named branches. My duty was to control the bank's books; I did not keep them. The bank kept books of account of all its transactions, including also the transactions involving the collection of drafts forwarded to it by other banks. Its books were kept correctly.

In the early part of 1904 it has a transaction involving the collection of drafts sent to it for collection by the National Bank of Commerce of Seattle, Washington, U. S. A. In 1904, it received several drafts drawn upon Clarkson & Co. from the National Bank of Commerce of Seattle for collection. In January, 1904, it received a draft for $36,194.80, drawn by the Centennial Mill Co. upon Clarkson & Co., payable 90 days after sight. This draft was received on January 9/22, 1904. This draft was presented by the bank to Clarkson & Co. on or about January 10/23, 1904.

Clarkson & Company accepted said draft on January 17/30, 1904.

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The bank notified the National Bank of Commerce that said draft had been accepted by letter dated January 17/30, 1904. No. 1903. When the draft was received by the bank it was accompanied with bills of lading, insurance policy, and sale bill for 35,312 sacks of flour shipped by S. S. "Hyades." These documents were kept in the safe of the bank at the disposal of the National Bank of Commerce of Seattle until payment of the draft by Clarkson & Co.

At the maturity of the draft Clarkson & Co. had not paid the amount of the draft to the bank or any part of it; and the bank sent the draft to the Public Notary of Port Arthur, asking him to call for payment of same and in the event of refusal to protest the draft for nonpayment.

In the months of April and May, 1904, there existed a condition of war at Port Arthur. The war was going on between Russia and Japan. In April, 1904, the Japanese troops landed near Port Arthur (on the Kwantung peni-sula). On April 21, Russian style, May 4th, American style, the Japanese troops cut the communications by land and as the Japanese fleet had blockaded Port Arthur since
21 January 27th, Russian style, February 9th, American style, 1904, the communication with Port Arthur ceased.

Clarkson & Co., merchants of Port Arthur, were buying and selling different kinds of goods. They were agents for several insurance and other companies and also engaged in shipping in quality of agents for different steamship companies. I did not know about any connection between Clarkson & Co. and the Boston Steamship Co. and the Boston Towboat Company in 1903 and 1904.

In April, 1904, and at the request of the representative of the Centennial Mill Co. of Seattle who was in Shanghai at that time, the bank at Port Arthur made inquiries regarding the "Hyades" flour; and then I learned that Clarkson & Co. were the agents for the S. S. "Hyades" of the Boston Steamship Co. and the Boston Towboat Co.

Interrogatory 23. State all that you know about the flour shipped per S. S. "Hyades" to Clarkson & Co. against which the draft for $36,194.80 was drawn.

Answer. It was not the bank's business to look after the flour shipped per S. S. "Hyades" to Clarkson & Co., against which the draft was drawn for $36,194.80. It was also not the business of the bank to examine either the quality or quantity of the flour, the bank not being Commissioner for the purchase or sale of it. The bank could also not prevent the discharging of the cargo, not being empowered to do so by the National Bank of Commerce of Seattle.

Clarkson & Co. were the shipper's (The Centennial Mill Co.) assigns, as may be seen from the bill of lading accompanying this draft.

(Witness includes copy of letter, Plaintiff's Exhibit One, see post, page —) and proceeds,

According to these instruments of the National Bank of Commerce of Seattle, the bank had to present the draft for $36,194.80 drawn at 90 days' sight to Clarkson & Company for acceptance, and

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to keep the accepted draft with documents at the disposal of the National Bank of Commerce of Seattle until the maturity of the draft; in case of non-payment of said draft to protest and return it to the National Bank of Commerce of Seattle, holding also
22 the documents at the disposal of the said bank. I can only suppose that the "Hyades" flour was discharged by Clarkson & Co., as they were the agents of the S. S. "Hyades" which arrived in January, 1904, at Port Arthur.

After the capitulation of Port Arthur, the Japanese military officers took possession of the books, papers, effects and property of the Russo-Chinese Bank and retained the same until March, 1906.

Having applied several times to the Japanese Government for permission to go to Port Arthur for the supervision of the said books, papers and effects, I received the permission from the Japanese Government to go to Port Arthur only in February, 1906, and having taken the necessary steps before the Japanese authorities, I finally succeeded in recovering them in March, 1906. The bank had no access to the said books, papers and effects while they were in the possession of the said Japanese military forces.

The said books, papers and effects are now in St. Petersburg, in the offices of the Russo-Chinese Bank.

There is a difference between the Russian calendar and the calendars of other countries (English or United States) of thirteen days. For instance the 17th day of April, according to the Russian calendar, would be the 30th day of April in English or United States.

The laws of the Russian Empire were in force at Port Arthur in 1903 and '4.

The Russian law as to days of grace on bills of exchange was in force in Port Arthur.

There were no consuls of other countries or institutions besides the Russian authorities having jurisdiction at Port Arthur. And according to the Russian law the drawee has two days' grace besides Sundays and holidays during which time protest is suspended.

Interrogatory 33. If you have before you the books of the Russo-Chinese Bank at Port Arthur covering the time of 1904 and '5, and containing entries referring to the transaction of the draft of the Centennial Mill Company upon Clarkson & Co. for $36,194.80 about which you have already been interrogated, please exhibit to the officer taking your deposition the entries in
23 said books referring to said draft and have a copy of such entries in the Russian language together with a translation thereof attached to your deposition.

Answer. Yes, I have before me the books of the Russo-Chinese Bank at Port Arthur covering the time of 1904 and '5. I beg to attach an identified copy of the entry of the draft of the Centennial Mill Co. upon Clarkson & Co. for $36,194.80 and an identified translation thereof into English which you have compared with the original book I have exhibited to you.

Interrogatory 35. If you have before you any letter copy-book of the Russo-Chinese Bank of Port Arthur containing any letters

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or telegrams addressed or forwarded by said bank to the National Bank of Commerce of Seattle please exhibit.

Answer. Yes, I have a copy of all letters addressed and forwarded by the Russo-Chinese Bank to the National Bank of Commerce of Seattle since 1902. The letters were copied in general copy-books for divers clients of the former branch of the Russo-Chinese Bank at Port Arthur. The said copy-books are here exhibited. See Exhibits "A," "B," "C," "D," which are certified to be true copies.

Interrogatory 36. Please refer to any part of the bank's records which you can identify and which contains an account of the disposition of the draft upon its non-payment.

Answer. I beg to attach identified copies with translation thereof into English of a letter dated April 19th, 1904, addressed by the Bank at Port Arthur to the Notary of the city of Port Arthur directing to produce the draft for $36,194.80 for payment to Clarkson & Co. and in the event of refusal to protest the same. Also an identified copy of letter dated May 13/26, 1904, addressed to the National Bank of Commerce of Seattle with which the protested draft for $36,194.80 was returned. Also a correct extract with English translation from the original book of the Russo-Chinese Bank, Port Arthur Branch, called Bills for Collection, page 27, for the year 1904, showing that the draft for $36,194.80 was returned on May 13th, 1904, to the National Bank of Commerce of Seattle. And the documents attached to the said draft were returned on June 14/27, 1906, to the Russo-Chinese Bank at
24 San Francisco. Now the said documents are in my possession. Here follow copies of papers referred to.

PORT ARTHUR, the 19th of April, 1904.

To the Notary of the City of Port Arthur, Present.

DEAR SIR: We beg you hereby to present for payment and in the event of refusal to protest the bills of exchange annexed herewith.

No. in numerical order.	No. of the bills of exchange.	In whose name.	Against whom to be protested.	Date of maturity of the bills of exchange.
1	11364	R. C. B.	A. Michailovsky	19 / IV
2	7646	L. Kaialoff	Tun-Sun-Sjan Co.	"
3	5908	G. Borman Stv	Zozunoff	18 / IV
4	7035	Centennial Mill Co.	Clarkson & Co.	17 / IV

Amount of the bills of exchange. Roubles.	C.	Remarks:
300	—	
587	82	
863	57	
71.665	70	

at the rate of exchange of date
198 Gold Dollars 36,194.80.

Yours truly,

RUSSO-CHINESE BANK.
A. OVSIANKIN.
A. FRIEDBERG.

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13/26th May, 1904.

National Bank of Commerce, Seattle, Wash.:

Your rem'ce for coll. 11/XII-03 No. 1559/7035 G$36,194.80 pr. 17/IV-1904 D/P on Clarkson & Co. Port Arthur.

DEAR SIR: We beg you hereby to present for payment and in herewith returned together with its deed of protest. Kindly acknowledge receipt and remit on our account to the First National Bank of your city Rbs. 566.25 sundry charges as per following description, thus obliging.

25	Rbs. 271.50	3/8% comm.
	" 184.25	protest
	" 2.—	carriage fare
	" .50	postage
	" 108.—	billstamp
	Rbs. 566.25.	

The reason of dishonor is that the goods have not been landed here. The shipping docts. are being kept here pending receipt of your instructions.

Yours faithfully,

RUSSON-CHINESE BANK.
(Port Arthur Branch.)
A. D. MAMONOFF,
p. p. FRIEDBERG.

Enclosed:
one bill (first)
one bill (second)
one deed of protest.

For Extract from book "Bills for Collection," see Post, p. —.

I personally knew Mr. A. Belinsky, who was Public Notary at Port Arthur in the months of April, May, 1904.

Interrogatory 39. Produce and attach to your deposition any official record made by said A. Belinsky of his action concerning said draft, and if same is in the Russian language have a correct translation of the same into English had any attach original and translation to your deposition.

Answer. I beg to attach the official record of the bills of exchange presented at the offices of A. Belinsky, Public Notary, of Port Arthur during April, 1904, Russian style. Also a correct extract from it, Page 6, No. 179, concerning the draft for $36,194.80 with the translation thereof into English. Said extract is as follows:

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In the Month of April of the Year 1904.

Page 6.

Who issued the bills of exchange.	On whom drawn.	Against whom is made the protest.	For what sum. Roubles cop.	In whose name protested.	Date of the protest.
26		179.			
Centennial Mill Co.	Clarkson & Co	Transfer Clarkson & Co.	71.665 70	Centennial Mill Co.	20

Interrogatory 41. State what you know, if anything, of the payment to the Russo-Chinese Bank at Port Arthur by or for account of Clarkson & Co. of the sum of about 67,000 roubles on or about April 30th, 1904.

Answer. On April 17/30, 1904, according to the cash-book of the Russo-Chinese Bank, Port Arthur, of same date the representative of Clarkson & Co. cashed a check endorsed by him, No. 1156, dated April 16, 1904, for 67,000 roubles, drawn by M. Ginsburg & Co. on their account with the Russo-Chinese Bank at Port Arthur. On the same date Clarkson & Co. paid to the bank (1) the equivalent of the draft, No. 1412/6386 for G. $4,136 received from the National Bank of Commerce of Seattle, plus 6% interest on the same for 220 days=G. $151.65=G. $4,387.65, at the rate of 198=8,489 roubles and 55 cop. (2) The equivalent of the draft No. 455/6500 for G. $16,155.20 received from the National Bank of Commerce of Seattle, plus 6% interest on the same for 200 days, G. $538.50=G. $16,693.70, at the rate of 198=33,053 roubles, 53 cop. (3) Expenses on the said drafts, bill stamps commission, telegram expenses and postage, 305 rbls. 80 cop. (4) That part to the credit of their own account with the Russo-Chinese Bank at Port Arthur 25,151 roubles 12 cop.

Of course the bank could not enforce Clarkson & Co. to apply their money in one way or another and was obliged to merely follow their client's instructions. The proceeds of the draft 6,386/1412 and 6500/1455 G. $20,981.35 were remitted on the same date to the National Bank of Commerce of Seattle by telegraphic transfer on Ladenburg, Thalmann & Co., New York. At that time the value of 67,000 roubles represented about $33,838.88 United States currency, at the rate of 198.

On the 17/30 day of April, 1904, the bank at Port Arthur had in its portfolio besides the draft for $36,194.80 the documents which were attached to the following drafts of the Centennial Mill
27 Co. drawn upon Clarkson & Co.: 1. G. $4,136, due February 27th, 1904, Russian style. 2. G. $16,155.20 due March 8, 1904, Russian style. 3. G. $23,468.40 drawn 90 days' sight. All these drafts had the following stamp "Payable at the Bank's demand, rate of exchange on New York at date together with interest at 6% per annum from date of this draft to estimated date of return of remittance in Seattle, Washington." The amount of the drafts G. $4,136 and G. $16,155.20 was paid with interest as stipulated on the 17/30 April, 1904, and the amount of G. $20,981.35 remitted to the National Bank of Commerce of Seattle by telegraphic transfer

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on Ladenburg, Thalmann & Co. of New York. The draft for $23,468.40 was not accepted by Clarkson & Co. and had to be protested for non-acceptance on May 23d, June 5th, American style, 1904, and returned together with the deed of protest for non-acceptance to the National Bank of Commerce of Seattle on June 7/20, 1904.

I do not know out of what funds Clarkson & Co. paid the drafts mentioned above, but I presume that Clarkson & Co. applied a part of the money cashed from the bank at Port Arthur against M. Ginsburg & Company's check for 67,000 roubles on the same day.

Being cross-examined, the witness answered:

I was connected with the Russo-Chinese Bank at Port Arthur since August, 1901, and was holding the power of attorney for that branch since December, 1901. I did not personally keep the books of the Russo-Chinese Bank of Port Arthur during the latter part of the year 1903 and until the month of June, 1904, but merely supervised the keeping of the books.

The bank at Port Arthur kept a special book for all bills of exchange received for collection with documents or without them. As soon as a bill of exchange was received it was entered in the general book "Bills of Exchange for Collection." In that book was noticed the date of receipt, the current number of the bill in numerical order, the number given by the remitter or indicated on the bill, the date of the letter of the remitter relating to the bill, the name of the firm of the remitter, and town of the remitter, and kind of documents relating to the bill, the drawer of the bill, the town of the drawer, the date of the issue of the bill, the
28 drawee, if a sight draft, and notice of the time presentment was made, the date of maturity, the instructions of the remitter, the amount of the draft and date of payment or return of the draft. If a sight draft was accepted by the drawee the date of maturity was noticed in the book.

Attached to the drafts of the Centennial Mill Company upon Clarkson & Co. for G. $4,136, G. $16,155.20, G. $36,194.80, and G. $23,468.40 there were attached bills of lading, sales bills and insurance policies, or certificates of marine insurance effected.

To the draft for $36,194.80 drawn by the Centennial Mill Co. upon Clarkson & Co. there were attached the following documents: Original and duplicate of the bills of lading, No. 569 for 35,312/4 sacks of flour shipped by S. S. "Hyades" to the port of Port Arthur or Dalny, issued by the Boston Steamship Co. and Boston Towboat Co., Seattle, on Dec. 9th, 1903; original and duplicate of the Certificate of the Fireman's Fund Insurance Co. of San Francisco No. 52,459, for G. $40,000, on 35,312/4 sacks "Russo-Chinese" flour shipped on board the "Hyades" from Seattle to Port Arthur or Dalny and issued in Seattle December 11th, 1903, and a copy of the bill of sale issued by the Centennial Mill Co. to Clarkson & Co. for 35,312/4 sacks "Russo-Chinese" flour for G. $36,194.80, with letter of the 13/26 May, 1904. The bank at Port Arthur, when returning the above said draft with deed of protest for non-payment, informed the National Bank of Commerce of Seattle that the documents attached to the draft G. $36,194.80 were kept at the disposal of the

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remitter. When said documents were recovered from the Japanese authorities at Port Arthur and sent to the head office of the Russo-Chinese Bank at St. Pertersburg, the latter forwarded them to the branch office of the bank at San Francisco on June 14/27, 1906, with instructions to deliver the documents to the National Bank of Commerce of Seattle against payment of the amounts due to the Russo-Chinese Bank. Now, the documents are in my possession and I attach them herewith. Copy of documents attached as follows:

29

(A.)

Centennial Mill Company,
Merchant Millers,
Seattle and Spokane, Washington.

SEATTLE, Dec. 10, 1903.

Sold to Clarkson & Co., Port Arthur and/or Dalny 35,312/4 sax- 8,828 Bbls. "Russo-Chinese" flour at $4.10 $36/194.80.
c. if Shipped via S. S. "Hyades."
Terms Draft 90 days thro' Russo-Chinese Bank.

(Stamped:) Russo-Chinese Bank. No. 7055. Port Arthur.

(Copy.)

(B.)

Marks and Numbers.

(In Duplicate.)

No. 52459.

$40,000.00.

Fireman's Fund Insurance Company of San Francisco.

SEATTLE, W'N, Dec. 11, 1903.

This certifies that Centennial Mill Company is insured under and subject to the conditions of open Policy No. 1457, Entry No. 4665 of the Fireman's Fund Insurance Company, in the sum of Forty Thousand and 00/100 Dollars on 35,312 sks. "Russo-Chinese" flour, valued at sum insured on board the "Hyades" via ports and con. str. and/or stmrs. at and from Seattle, Wn., to Port Arthur and/or Dalny, loss if any payable in Hongkong to assured or order upon surrender of this Certificate properly endorsed and receipted.

J. B. LEVISON,
Marine Secretary.

Countersigned:
BURNS, ATKINSON & CO., *Agent.*

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30 (Stamped:) Russo-Chinese Bank. No. 7035. Port Arthur.

Insured against all risk of particular average without limitation. Not valid unless countersigned by Burns, Atkinson & Co., Agents, Seattle, Wash.

In case of loss or damage to the interest insured under this policy, same shall be reported as soon as goods are landed or loss known to the Union Insurance Society of Canton, Limited, at Hongkong, Shanghai or Yokohama, and all claims shall be paid at the charter Bank of India, Australia and China, upon presentation of certificate of loss signed by said Society.

Endorsed on back: Centennial Mill Co., by R. C. Hasson, V. P.

(C.)

In Duplicate.

Export Bill of Lading No. 369.

Boston Steamship Company and Boston Tow Boat Company.

(Stamped:) Russo-Chinese Bank, No. 7035, Port Arthur,

Puget Sound-Oriental Line.

Agencies: Dodwell & Co., Ltd., General Agents at Yokohama and Kobe, Japan; Shanghai, Hankow, Foochow, China; Hong Kong, Colombo, Ceylon.

Agencies: Seattle, Wn., Tacoma, Wn. Frank Waterhouse, Managing Agent.

San Francisco, E. H. Forester, G. A. N. P. Ry.

Received from Centennial Mill Co. in apparent, good order and condition, except as noted, the following property (contents and condition of contents of packages unknown), marked, consigned and destined as indicated below for shipment at Seattle by steamship "Hyades" or any other steamship of the Boston Steamship Company or Boston Towboat Company:—

31 Rates of freight. Marks and numbers.

G $5.00 per 2000# . . . . G $4325.72 Russo-Chinese.

Payable at Seattle . . . . . G $4325.72

Articles.

35312 Qr. Sax Flour
1 Bundle (200) mty sax.
Measurement — tons — feet
Weight, lbs. 1,730,288
} (Subject to correction.)

To be carried by said steamer or any other steamer of the above company to the port of Port Arthur &/or Dalny (or so near thereto

as she or they may safely get) with liberty to call at any port or ports in or out of the customary route (in any order), and to be there delivered unto Shipper's Order or to his or their assigns (Notify Clarkson & Co.) or to another carrier on the route to destination, if consigned beyond a regular port of call, upon payment of the freight thereon at the rate of $5.00 per ton from Seattle to Port Arthur &/or Dalny payable as above in United States Gold Currency, with all other charges, advanced charges and average, without any allowance of credit or discount. Freight and advance charges payable at carrier's option in advance, in cash, or immediately on discharge of the property at the port of Port Arthur &/or Dalny in its equivalent in local currency at bank demand rate of exchange on New York.

In consideration of the rate of freight therein named, it is hereby stipulated that the service to be performed hereunder shall be subject to the conditions, whether printed or written, herein contained, and said conditions are hereby agreed to by the shipper and by him accepted for himself and his assigns as just and reasonable.

With respect to the service it is agreed that:

Conditions.

.....

.....

In witness whereof, the Agent signing on behalf of the said steamer, has affirmed to 2 Bills of Lading all of even tenor
32 and date, one of which Bills being accomplished, the others to stand void.

Dated at Seattle this 9th day of Dec., 1903.

FRANK WATERHOUSE,
By W. D. BENSON,
Managing Agent.

Endorsed on back: Centennial Mill Co., by R. C. Hasson, V. P.

I had general supervision only of the draft for G $36,194.80. Mr. Chernin, the chief of the department for collection of bills of exchange, and Mr. Alexander Drosdoff had charge of the draft. Mr. Chernin, now manager of the Russo-Chinese Bank at Chita, Siberia, presented the draft to Clarkson & Co. for acceptance immediately on receipt of it. The draft was accepted by Clarkson & Co. in writing at the office of the Russo-Chinese Bank at Port Arthur on the 17/30 January, 1904. Neither myself nor the Russo-Chinese Bank made any investigation at any time as to the quantity or quality of flour in the go-downs or warehouses of Clarkson & Co. at Port Arthur. Nor as the shipment of flour on the "Hyades." It was not the duty of the bank to look after goods in the go-downs of the steamship agent.

The bank at Port Arthur had a lot of documents in its portfolio for collection and dealt with the documents only unless otherwise instructed by the remitter. The National Bank of Commerce of Seattle remitted the draft for $36,194.80 simply for collection. The

bank at Port Arthur acknowledged the receipt of this draft by letter dated January 9/22, 1904.

I do not know how much flour Clarkson & Co. had in their godowns at the commencement of hostilities between Russia and Japan.

According to the bill of lading the shipment of 35,312 sacks of flour on the "Hyades" was shipped by the Centennial Mill Co. as consignor to the port of Port Arthur or Dalny. The bill of lading was endorsed in blank by the Centennial Mill Co. Therefore the consignee is unknown. The bill of lading contained the following
Clause: "to be delivered there unto shipper's order or to his
33 or their assigns (Notify Clarkson & Co.) or to another carrier
on the route to destination." The bill of lading was attached to the draft.

Neither the bank at Port Arthur nor myself ever obtained possession of the shipment of flour. Nor did the bank at Port Arthur take this flour into custody or control or sell it to the Russian Government or to one Ginsburg, a representative of the Russian Government. Nor did I or the Russo-Chinese Bank at Port Arthur surrender the draft or the documents attached thereto to the agent of the Steamship Co. These documents are in the possession of the Russo-Chinese Bank up to this date. The bank never got possession of the flour and never transferred it to Ginsburg. The bank never realized any sum from Ginsburg for this flour; never sold or delivered it to Ginsburg; nor do its books show any entries regarding such sale.

Cross-interrogatory 19. Do the books of the bank disclose the disposition of the funds from the sale of the flour to Ginsburg? If so, point out to the officer taking this deposition the entries showing such disposition. Make copies of said entries, giving the name of the book and the page upon which the entries occurred and have them translated into English. I want you to be particular and minute in answering this cross-interrogatory. Attach to your deposition all entries in all books of the bank touching the receipt and method of disposition of the 67,00- roubles realized from the sale of this flour.

Answer. I do not know and cannot know whether the 67,000 roubles cashed by Clarkson & Co. against the check drawn by Ginsburg were paid by the latter for the "Hyades" flour. I attach the following identified copies and translation of them of all entries regarding the payment of 67,000 roubles to Clarkson & Co. for account of M. Ginsburg & Co. on April 17/30, 1904, and the dispositions made by the latter on the same day.

(1) Copy of the check No. 1156 for 67,000 rs. issued by M. Ginsburg & Co., order bearer and endorsed by Clarkson & Co. (2) Copy of the cash voucher of April 17/30, 1904, for 8,489—roubles and 55 copecks received from Clarkson & Co. for account of the National Bank of Commerce of Seattle B/C No. 1412 (our No. 6386)
for G $4,136, with interest thereon. (3) Copy of the cash
34 voucher of April 17/30, 1904, for 33,053 roubles and 5
copecks received from Clarkson & Co. for account of the National Bank of Commerce B/C No. 1455 for G $16,155.20 with

interest thereon. (4) Copy of the cash voucher of April 17/30, 1904, for 305 roubles and 80 copecks, being commission, postage, telegram expenses and stamps on the said drafts of the National Bank of Commerce of Seattle. (5) Copy of the cash voucher of April 17/30, 1904, for 25151 roubles 12 cop. received from Clarkson & Co. to the credit of their correspondent's account. (6) Copy of the cash-book, page 216 of April 17/30th, 1904, re. Rbls. 8.489,55 and Rs. 33.053,53, received from Clarkson & Co. (7) Extract of the cash-book page 217 of April 17/30th, 1904, re. Rbs. 25.151.12 received from Clarkson & Co. and Rs. 67.000, paid against M. Ginsburg & Co.'s check No. 1156. (8) Extract from the book "Journal," pages 311 and 312 of April 17/30, 1904, showing the entries re. transfer of $20.981,35 equal to Rs. 41.543,08 to the National Bank of Commerce of Seattle. (9) Extract from the book "Correspondents their accounts," page 292, showing the movement of Clarkson & Co.'s account from April 12/25th, 1904, up to May 4/17, 1904, showing all the time a debit balance of their account, also payment of Rs. 25.151.12 to their credit on April 17/30, 1904.

Here follow documents identified by the witness as follows:

(Copy of the Check.)

Stamp: April 17, 1904.

Number of account 5. M. Ginsburg & Co.

Russo-Chinese Bank.

Port Arthur, 16th April, 1904. Roubles 67000.—
(con.)

Russo-Chinese Bank.

Please pay to the bearer sixty seven thousand roubles and pass this amount to the debit of my special account.

Paid. Trading Firm.
(Stamp.)

M. GINSBURG & C.
By procuration L. BLANKMAN.

No. 1156.

35 (On the back of the check:) Trading Firm Clarkson & Co. By procuration N. Lerokuzoff.

(Copy of the Cash Voucher.)

17/IV, 1904.

Received from Messrs. Clarkson & Co.

Account Correspondents their account sundries according to letter of Nat. Bank of Commerce, Seattle, dated 6/X '03, Bill for collection $1412 our number 6386, G $4,136 plus 6% for 220 days G $151.65=G $4,287.65 at 198—Roubles 8,489.55 (eight thousand four hundred and eighty-nine roubles 55 cop.).

Cashier sign, Stamp: received.
G.

(Copy of the Cash Voucher.)

Received from Messrs. Clarkson & Co.

17/IV, 1904.

Account Correspondents their account sundries according to letter of Nat. Bank of Commerce Seattle, dated 26/X '03 Bill for Collection $1455 our number 6500 G $16,155.20 plus 6% for 200 days G $538.50=G $16,693.70 at the rate of 198 Roubles 33,053.53 (thirty three thousand fifty three roubles & 53 copeck).

Stamp: received.

Cashier sign.
G.

(Copy of Cash Voucher.)

Received from Clarkson & Co. 17/IV, 1904.

Account Sundries
on our numbers 6500 and 6386

our commission for collection	Roubles 174.50
for telegram	70.—
postage	1.—
stamps	60.30
	Roubles 305.80

(three hundred and five roubles 80 copecks.)

Stamp: received.

Cashier sign
G.

36 (Copy of Cash Voucher.)

5 476
Receive 291/II
Account Correspondents
Clarkson & Co.
N 7 ..... Roubles 25,151.12

Twenty five thousand one hundred and fifty one roubles and 12 copecks.

Stamp received April 17th, 1904.

The words "current account" not to be read.

As far as I know during the siege of Port Arthur the price of flour was a little higher than before the outbreak of the war, but there was a lot of flour in the go-downs of the Government and no scarcity was felt of it. I do not know the price of the flour.

There was no telegraphic communication possible with Port Arthur on April 28th/May 10th, 1904. No telegram was sent on that date from Port Arthur to Vladivostok in answer to a telegram

from Vladivostok inquiring as to whether the drafts drawn by the Centennial Mill Co. upon Clarkson & Co. had been paid. And in no such telegram was it stated by the Port Arthur branch of the Vladivostok branch that all of the drafts of Clarkson & Co. had been paid. The bank at Port Arthur never telegraphed in substance that the draft for $36,194.80 had been paid. The Russo-Chinese Bank at Port Arthur did not wire to the Russo-Chinese Bank at Shanghai to the effect that the draft for $36,194.80 had been paid by Clarkson & Co. There was no telegraphic communication with Shanghai on or about May 10th, 1904.

The account of the firm of Clarkson & Co. with the Russo-Chinese Bank, Port Arthur branch, showed a debit balance from the first of December, 1903, up to December, 1904 (with the exception of June, 1904). Clarkson & Co. owed to the Russo-Chinese Bank at Port Arthur.

During December, 1903 (Russian style), about 51,000 roubles.
During January, 1904 (Russian style), about 49,000 roubles.

37 During February, 1904 (Russian style), about 40,000 roubles.

During March, 1904 (Russian style), about 41,000 roubles.
During April, 1904 (Russian style), about 35,000 roubles.
During May, 1904 (Russian style), about 20,000 roubles.
During June, 1904 (Russian style), about 30,000 roubles.
During July, 1904 (Russian style), about 36,000 roubles.
During August, 1904 (Russian style), about 37,000 roubles.

The following is a statement of Clarkson's account with the Port Arthur branch of the Russo-Chinese Bank on the dates mentioned.

December 1/14, 1903, Clarkson & Co. owed to the bank Rs. 55,363.72.

December 15/28, 1903, Clarkson & Co. owed to the bank Rs. 55,331.07.

January 1/14, 1904, Clarkson & Co. owed to the bank Rs. 50,003.12.

January 15/28, 1904, Clarkson & Co. owed to the bank Rs. 49,136.20.

February 1/14, 1904, Clarkson & Co. owed to the bank Rs. 48,451.65.

February 15/28, 1904, Clarkson & Co. owed to the bank Rs. 42,294.30.

March 1/14, 1904, Clarkson & Co. owed to the bank Rs. 40,995.90.

March 15/28, 1904, Clarkson & Co. owed to the bank Rs. 40,938.90.

April 1/14, 1904, Clarkson & Co. owned to the bank Rs. 40,923.90.

April 15/28, 1904, Clarkson & Co. owed to the bank Rs. 41,326.54.

May 1/14, 1904, Clarkson & Co. owed to the bank Rs. 41,544.65.

May 15/28, 1904, Clarkson & Co. owed to the bank Rs. 14,925.25.

June 1/14, 1904, Clarkson & Co. had a credit balance Rs. 5,146.45.

June 15/28, 1904, Clarkson & Co. had a credit balance Rs. 10,586.45.

38 July 1/14, 1904, Clarkson & Co. owed to the bank Rs. 33,568.65.

July 15/28, 1904, Clarkson & Co. owed to the bank Rs. 36,708.15.

August 1/14, 1904, Clarkson & Co. owed to the bank Rs. 36,708.15.

August 15/28, 1904, Clarkson & Co. owed to the bank Rs. 36,708.15.

On January 14, 1904, Clarkson & Co. had an overdraft account with the Port Arthur Branch of the Russo-Chinese Bank for 50,000 roubles. This amount had to be repaid by Clarkson & Co. by monthly installments of 3,000 roubles (or to reduce their indebtedness by 3,000 roubles monthly).

Cross-interrogatory 33. Attach to your deposition copies from the books of the bank, giving book and page where same occurs, the entries showing the various payments made by Clarkson & Co. to the Russo-Chinese Bank from December 1st, 1903, to August, 1904, and state from what sources the various sums paid by Clarkson & Company came.

Answer. I do not know from what sources Clarkson & Co. paid these sums. I attach extracts from the cash-book of the Port Arthur Branch of the Russo-Chinese Bank showing the payments made by Clarkson & Co. to the Russo-Chinese Bank from December, 1903, to August, 1904. Here follow extracts from the books.

I do not know from what sources Clarkson & Co. realized the sums which they paid into the bank or that they were realized from the sale of flour covered by documents attached to the various drafts drawn by the Centennial Mill Co. upon Clarkson & Co. in the hands of the bank for collection.

Relating to the draft for G $16,155.20 drawn by the Centennial Mill Co. upon Clarkson & Co. covering a shipment of flour on the steamer "Tremont" consisting of 1,000 sacks of "Blue Stem" flour and 14,688 sacks of "Russo-Chinese" flour, due about March 8, 1904, this was a draft drawn with documents attached and was accepted by Clarkson & Co. December 8/21, 1903, and became due March 8/21, 1904. It was paid April 17/30, 1904, and was remitted to the National Bank of Commerce with another sum of $4136 by
39 telegraph on Ladenburg, Thalmann & Co., New York. This draft could not be protested for nonpayment at maturity because of the absence of the notary from Port Arthur.

I do not know when the flour securing the said draft reached Port Arthur or to whom it was sold. There are no entries in the books of the bank relating to the sale of the merchandise securing that draft. The bank did not sell the merchandise. The proceeds of that flour were not received by the Russo-Chinese Bank or applied by the bank to the reduction of the indebtedness of Clarkson & Co. to it.

Clarkson & Co.'s indebtedness to the bank was an overdraft account with the bank secured by promissory notes. The notes were in the ordinary form, signed by Clarkson & Co. I cannot attach copy of them as they are not in my possession. I do not know from what source Clarkson & Co. realized the money with which they made payments on their indebtedness.

The Russo-Chinese Bank at Port Arthur did not use the proceeds

of flour securing the draft for G$16,155.20 or the proceeds of the sale of flour securing another draft for $4,136 made by the Centennial Mill Co. in favor of the National Bank of Commerce upon Clarkson & Co. toward the reduction of the indebtedness of Clarkson & Co. to the bank.

The Russo-Chinese Bank did not in the early part of 1904 realize that Clarkson & Co. was insolvent; nor did it appropriate to its own use the proceeds of flour securing the drafts that it had for collection for the National Bank of Commerce; nor did it appropriate such proceeds against the reduction of the indebtedness of Clarkson & Co. to it.

The bills of lading attached to the draft for $36,194.80 was issued by the Boston Steamship Co. and the Boston Towboat Co. of Seattle. I do not know who issued the other bills of lading. The agents of the S. S. "Hyades" in 1904 were Clarkson & Co. I do not know who were the agents of the other steamship company.

About April 15/28, 1904, the Russo-Chinese Bank ascertained that Clarkson & Co. were the agents of the steamship company operating the "Hyades." This was ascertained at the request of H. F. Ostrander of the Centennial Mill Co. communicated through the Russo-Chinese Bank at Shanghai to the Bank at Port Arthur.

The fact was the bank at Port Arthur replied immediately by wire that Clarkson & Co. were in possession of the goods and that the goods had been sold by them.

When the bank had knowledge that Clarkson & Co. had possession of the flour, the bank informed H. F. Ostrander of the Centennial Mill Co. of Seattle and the National Bank of Commerce of Seattle of that fact.

On the 5th of August, 1904, the bank at Shanghai sent to the National Bank of Commerce of Seattle a letter containing copies of correspondence on the subject of the drafts and the branch bank at Shanghai and Ostrander with the Centennial Mill Co.

As near as I can recollect the first draft drawn by the Centennial Mill Co. upon Clarkson & Co. sent to the Russo-Chinese Bank at Port Arthur by the National Bank of Commerce was one for G$52,925, which was received at Port Arthur in April, 1902.

It is not true that from that time forth the bank at Port Arthur had knowledge that Clarkson & Co. were the agents of the steamship company.

The instruction of the National Bank of Commerce to the Russo-Chinese Bank was to the effect that the drafts drawn on Clarkson & Co. were to be accepted by Clarkson & Co., and that the bank at Port Arthur was to hold the documents, bills of lading, etc., securing the drafts and not to deliver them to Clarkson & Co. until the drafts were paid.

At the request of Mr. Ostrander of the Centennial Mill Co. the bank made inquiries in April, 1904, regarding the flour covered by documents then in possession of the bank.

The bank's connection with these transactions was limited to the documents relating to the drafts and it had no reason without being

specially instructed to interest itself with the merchandise covered by the documents received for collection.

It did not permit Clarkson & Co. to take possession of the flour. If they took possession of it, they did it on their own responsibility.

It was not the bank's business to look after the merchandise.

41 And I did not know the manner or method in which Clarkson was transacting his business with reference to these drafts. Neither did I know that Clarkson got possession of the flour.

In the bill of lading attached to the draft for $36,194.80 the Centennial Mill Co. was the consignor; the consignee was unknown. The bill of lading was endorsed by the Centennial Mill Co. in blank and there were no other endorsements.

The bank did not have the legal right to take into its custody or control the flour covered by such bills of lading without being instructed thereto by the National Bank of Commerce of Seattle. It was not the bank's business to look after the merchandise covered by the bills of lading. The steamship company is responsible for the cargo.

In December, 1903, the Russo-Chinese Bank at Port Arthur extended to Clarkson & Co. a credit up to 50,000 roubles for their business in Port Arthur. This credit had to be repaid by bills of exchange drawn by Clarkson & Co. at Port Arthur on Clarkson & Co., Vladivostok, whereof 2,000 roubles on January 15/28, 1904, and afterwards by monthly payments of 3,000 roubles on 15/28 of each month.

The bank paid the same attention to the documents held as security for the drafts drawn on Clarkson & Co. as to other documents drawn on other firms at Port Arthur.

The credit was extended to the entire business of Clarkson & Co. and not for payments of the drafts drawn upon them.

Clarkson & Co. had no right to overdraw their account above the amount of the credit granted and had no arrangement with the bank by which they were permitted to take possession of the flour covered by the documents in possession of the Russo-Chinese Bank.

I do not know what became of the flour securing the two drafts for $4,136 and $16,155.20. The draft for $4,136 matured February 27/March 11, 1904. At the maturity of that draft Clarkson & Co. did not pay any money to the bank. The draft for $16,155.20 matured March 8/21, 1904. Clarkson & Co. made no payments on that date or at any time from February 26/March 10 up to April 1/14, 1904.

The bank has a record that on April 13/26, 1904, it noti-

42 fied the National Bank of Commerce of the non-payment of drafts for $4,136 and $16,155.20. The notification was given by letter of which copy is attached herewith as follows:

"7640. 13/26 April 4. 55.

The National Bank of Commerce, Seattle, Wash.

Your D/B No. 1412/6386 G$4,136.—due 27/11-111-1904 (D/P) on Clarkson & Co.

No. 1455/6500 G$16,155.20 due 8/21-111-1904 (D/P) P/Arthur

DEAR SIR: We return you herewith enclosed the above two bills (also second) which have been refused payment and request you to kindly acknowledge receipt. It was impossible for us to have them protested on account of the absence of the notary public, as it appears from the enclosed declaration of the P/Arthur Municipality, two copies of which please find enclosed, one for each bill.

Please remit for our a/c to Messrs. Ladenburg Thalmann & Co., New York, under advice to us.

G$76.09	3/8 % Comm.	on both bills
10.14	½ o/oo return comm.	
30.27	billstamps	
1.—	postage	

G$117.50 in all & oblige.

Yours faithfully,

RUSSO-CHINESE BANK.
(PORT ARTHUR BRANCH.)
p. p. A. OVSIANKIN.
p. p. A. FRIEDBERG.

Enclosed:—
2 bills & seconds.
2 declarations.

The drafts for $4,136 and $15,155.20 could not be protested for the reason that the Notary of Port Arthur was absent at the time of their maturity.

The draft for $36,194.80 was protested April 20/May 3, 1904, and returned with the deed of protest to the National Bank of
43 Commerce of Seattle with the letter dated May 13/26, 1904.

The draft for $36,194.80 with the deed of protest was received back from the Notary at Port Arthur at the time when communication was cut off both at sea and on land. Under such circumstances the mail could not be forwarded from Port Arthur, and therefore the bank kept the draft with the deed of protest in the safe until communication should be re-established.

The proceeds of the drafts for $4,136 and $16,155.20 were remitted by the bank at Port Arthur by telegraphic transfer to the National Bank of Commerce at Seattle through the head office of the bank at St. Petersburg, on Ladenburg, Thalmann & Co. at New York on April 17/30, 1904.

The Russo-Chinese Bank did not prior to the sale of flour to Ginsburg advance to Clarkson & Co. the money with which the drafts for $4,136 and $16,155.20 were paid. Nor did the bank out of the proceeds of the sale of the flour shipped on the "Hyades" reimburse itself for the money thus advanced.

I know the date on which the Japanese Government returned to the Russo-Chinese Bank the papers and effects of the bank captured at the time Port Arthur fell, because as soon as I received the permission of the Japanese Government I went to Port Arthur in February, 1906, in order to take the necessary steps before the Japanese authorities there for the recovery of the books, papers and effects of the bank, and received them back in March, 1906.

I know that all of the books, papers and effects in the possession of the Japanese military forces belonging to the bank were returned to it, because having been for over two years and also during the siege of Port Arthur in charge of the bank's business I knew what books, papers and effects were kept by the bank before they were seized by the Japanese military forces and know that I received them back.

I am not a lawyer by profession.

I know what official appointment A. Belinsky held. He had a notary's office at Port Arthur and all documents attested before him were recognized by the Court as well as official authorities. I never saw his official appointment.

44 And thereupon counsel for the plaintiff read in evidence the letter being the letter of the National Bank of Commerce of Seattle transmitting the draft herein in question to the Russo-Chinese Bank at Port Arthur:

H. C. Henry, President.
R. R. Spencer, Cashier.
O. A. Spencer, Ass't Cashier.

The National Bank of Commerce.

Codes:
A. B. C. & A. 1.
Lieber's.
Bedford McNeill.
Cable Address: "Commerce."

SEATTLE, WASH., Dec. 11, 1903.

The Manager Russo-Chinese Bank, Port Arthur, China.

DEAR SIR: Enclosed I hand you for collection and returns in New York funds 90 d/s drafts as follows:

Clarkson & Co. G $1,100.00.
" " " G$36,194.80.

Documents are to be delivered on payment.

Very truly yours,

R. R. SPENCER.

Counsel for plaintiff then introduced in evidence "Plaintiff's Trial Exhibit 1," as viz., the preceding.

Plaintiff offered in evidence the book extract produced by the wit-

ness in connection with Interrogatory 33 and his answer thereto which were as follows:

Interrogatory 33. If you have before you the books of the Russo-Chinese Bank at Port Arthur, covering the time of 1904 and 1905, and containing entries referring to the transaction of the draft of the Centennial Mill Company upon Clarkson & Company for $36,194.80, about which you have already been interrogated, please exhibit to the officer taking your deposition, the entries in such books referring to said draft, and have a copy of such entries in the Russian language, together with a translation thereof into English attached to your deposition.

45 Answer. Yes, I have before me the books of the Russo-Chinese Bank at Port Arthur, covering the time of 1904 and 1905. I beg to attach an identified copy of the entry of the draft of the Centennial Mill Co. upon Clarkson & Co. for $36,194.80 and an identified translation thereof into English, which you have compared with the original book I have exhibited to you.

The witness had also testified in response to cross-interrogatory 3, which was as follows:

Cross-interrogatory 3. State what particular books were kept with reference to the drafts drawn by the Centennial Mill Company upon Clarkson & Company and sent to the Russo-Chinese Bank by the National Bank of Commerce of Seattle for collection. Describe in detail the manner in which your books were kept with regard to entries relating to these drafts.

Answer. The bank at Port Arthur kept a special book for all bills of exchange received for collection with documents or without them. As soon as a bill of exchange was received, it was entered in the general book "Bills of Exchange for collection." In the general book "Bills of Exchange for collection" was noticed the date of receipt. the current number of the bill in numerical order, the number given by the remitter or indicated on the respective bill, the date of the letter of the remitter relating to the bill, the name or the firm of the remitter, the town of the remitter, the kind of documents relating to the bill, the drawer of the bill, the town of the drawer, the date of issue of the bill, the drawee, if a sight draft a notice of the term was made, the date of maturity, the instructions of the remitter, the amount of the draft and the date of payment or return of the draft. If a sight draft was accepted by the drawee, the date of maturity was noticed in the book "Bills of Exchange for Collection."

The said book extract was as follows:

46 *Extract from the Book, Bills for Collection of the Port Arthur Branch of the Russo-Chinese Bank, Page 27, of the Year* 1904.

Date of receipt.	Our No.	Their No.	Date of the letter with which received.	From whom received.
January 10, 1904	7035	1559	11/XII'03	Nat. Bank of Com.

Town.	Kind of documents.	Order.	Town.	Date of the draft.	Drawee.
Seattle	1 draft 1 invoice 1 bill of lading 1 insurance policy	Centennial Mill Co.	Seattle	11/XII'03	Clarkson & Co.

Maturity.	Instructions of the remitter.	Roubles.	Francs.	Mexican dollars.	Yen taels.
90 d. 17/IV'04	post rem.	———	———	———	———

Gold dollars.	Pound sterlin.	German marcs.	Foreign value in roubles.	Date in payment.	Observations.
36,194.80	———	———	72,389.60	———	Draft returned 13/V-'04 Document returned 14/27/VI'06 to San Francisco.

Plaintiff also introduced in evidence the documents attached to the deposition of the witness Friedberg in answer to cross-interrogatories, as follows:

1. Invoice. (See ante, page —.)
2. Fire Insurance Policy with endorsement thereon. (See ante, page —.)
3. Bill of lading in duplicate with endorsement thereon. (See ante, page —.)
4. Copy of check, April 17th, 1904, for 67,000 roubles. (See ante, page —.)
5. Copy of cash voucher April 17/30th, 1904, from Clarkson & Co. (See ante, page —.)

47 6. Copy of cash vouchers 330 53, 53 cop. from Clarkson & Co. (See ante, page —.)

7. Copy of cash voucher dated 17/IV, 1904, from Clarkson & Co. (See ante, page —.)
8. Copy of cash voucher, Clarkson & Co. 25,151.12 roubles. (See ante, page —.)
9. A letter addressed by Russo-Chinese Bank at Port Arthur to the National Bank of Commerce, Seattle, Washington, dated 13/26 April, 1904. (See ante, page —.)

Thereupon the plaintiff read in evidence the deposition of Alexander Drozdov, taken and certified before the Honorable James W. Ragsdale, United States Consul at St. Petersburg, Russia, and certified by him in his official capacity.

My name is Alexander Drozdov, thirty-four year old, residing at St. Petersburg. I am an officer of the Russo-Chinense Bank.

I resided between January 1st and December 31st, 1904, at Port Arthur. I was in the service of the Port Arthur Branch of the Russo-Chinese Bank, and was also employed as book-keeper in the

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Household-Economic Company of officers and military officials of the Quantoon region.

In my capacity as clerk of the Russo-Chinese Bank, I was keeping the books of the bills of exchange section. I kept the register of documents received and sent to be cashed, and from March 2/15, 1904, I kept also the register of bills of exchange received and sent to be cashed; wrote to the parties notices in regard to receipt of documents and bills to be accepted and paid. Wrote also to the Notary in regard to his presenting bills for acceptance and payment or protesting them in case of non-acceptance and refusal of payment, and sent such letters off.

After the departure of many of the staff of the office, viz. 17-19 July, 1904, I kept not only these books but did everything which was requisite by the course of the bank's affairs, which by this time was very much reduced owing to the siege of Port Arthur; thus for instance from the date mentioned, I also kept book of correspondents and the current accounts and filled out cash orders for the receipt and disbursement of various sums of money.

48 Interrogatory 6. State whether or not the bank kept books of account of its transactions and particularly its transactions involving the collection of drafts forwarded to it by other banks for collection.

Answer. Yes, books were kept absolutely on all operations of the bank and also on bills received by the bank to be cashed.

Interrogatory 7. Were its books involving such transactions kept correctly?

Answer. Yes, the books were kept according to rules.

The bank had transactions involving the collection of drafts sent to it for collection by the National Bank of Commerce, Seattle, Washington, in the year 1904, and among which were drafts on the trading firm of Clarkson & Co. In January, 1904, the bank received from the National Bank of Commerce a draft for the sum of G$36,194.80 on the firm of Clarkson & Co., drawn by the Centennial Mill Co. and payable at 90 days after sight. The last-named draft was received by the bank at Port Arthur on January 9/22, 1904. The draft was presented for acceptance on January 10/23, 1904. I know from the books of the bank that this draft was accepted by Clarkson & Co. on January 17/30, 1904. Also that the bank by letter dated January 17/30 1904, No. 1903, informed the National Bank of Commerce of the acceptance of the draft by Clarkson & Co.

This draft was accompanied by the following documents and bill for 35,312 sacks of flour; the original and duplicate of the certificate of an insurance policy, and the original and duplicate of a bill of lading of the S. S. "Hyades" the bank kept these documents in the safe-room until the firm of Clarkson & Co. should pay the draft for $36,194.80.

At the maturity of the draft it was not paid by Clarkson & Co. either in full or in part. As the draft was not paid at maturity I sent it by order of the managers of the bank to the Port Arthur

TO CLOSE IN CENTER

Notary, Belinsky, directing him to present it to Clarkson & Co. for payment and in case of non-payment to protest the documents.

In April and May, 1904, the war operations which began between Russia and Japan in January, 1904, still continued.

49 Port Arthur was declared to be in a state of siege. From January 27th, 1904 (old style), Port Arthur was blockaded from the sea and the Japanese periodically bombarded the town also from the sea side. By land Port Arthur was cut off after April 21, 1904 (old style). And in this manner the communication with Port Arthur was cut off after that time.

Clarkson & Co. was engaged as agents and commissioners under their own risk and responsibility and were representatives of several firms and agents for several steamship companies. I do not know what connection there was in 1903 and '4 between Clarkson & Co. and the Boston Steamship Co. and the Boston Towboat Co., or either of them.

In April, 1904, upon receipt of an inquiry from our branch in Shanghai I learned that Clarkson & Co. were the agents of the Boston Steamship Co.

Interrogatory 23. State all that you know about the flour shipped per S. S. "Hyades" to Clarkson & Co. against which the draft for $36,194.80 was drawn.

Answer. Judging by bills of lading and information gathered, Clarkson & Co. ought to have received the flour which arrived on S. S. "Hyades" and which was to come into their possession only upon payment of the draft for $36,194.80.

Upon the capitulation of Port Arthur all books, papers and documents belonging to the bank at Port Arthur were confiscated by the Japanese. These books, papers and documents were in the possession of the Japanese from December 22 (old style), 1904, to March, 1906. They were received back from the Japanese in March, 1906, by Alexander Friedberg, holding a power of attorney from the Russo-Chinese Bank.

While the books, papers and effects were in the possession of the Japanese the bank had no access to them.

They are now in the possession of the Board of the Russo-Chinese Bank at St. Petersburg.

The difference between the Russian and American calendars is thirteen days. April 17, old style adopted by the Russians, answers to April 30, adopted by the United States and England.

50 In 1903 and 1904, the laws of the Russian Empire were in force in Port Arthur.

In 1904 a law was in force in Port Arthur by virtue whereof two days' grace was allowed after date of maturity, besides Sundays and holidays.

Interrogatory 33. If you have before you the books of the Russo-Chinese Bank at Port Arthur covering the time of 1904 and 1905, and containing entries referring to the transaction of the draft of the Centennial Mill Co. upon Clarkson & Co. for $36,194.80 about which you have already been interrogated, please exhibit to the officer taking your deposition the entries in such books referring to

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said draft and have a copy of such entries in the Russian language together with a translation thereof into English attached to your deposition.

I identify and append hereto a copy of a letter from the National Bank of Commerce in which the documents for G. $36,194.80 were received. This letter was received in the bank on January 9, 1904, through the Russian postoffice in Port Arthur. (See ante, page 34.)

I produce here copy-books of the bank at Port Arthur containing copies of letters and telegrams addressed and forwarded by said bank to the National Bank of Commerce of Seattle, and copy herewith letters as follows:

(*a*) The letter of the Bank at Port Arthur to the Port Arthur Notary A. Belinsky, dated 19/IV, 1904, old style, with the request to present the draft for $36,194.80 for payment and to protest it in case of non-payment.

Extract from the book "Copying-book No. 16 Local biz from April 6 to July 15, 1904." Russo-Chinese Bank Port-Arthur Branch, page 116.

No. 7889.

PORT ARTHUR, April 19, 1904.

To the Notary Public of the Town of Port-Arthur, City.

SIR: By the present we beg you to present for payment and, in case of refusal, to protest the enclosed bills, viz:

51

Order No.	Bill No.	Name of drawer.	Name of drawee.	Terms of bill.	Amount rs.
1.	11364	Russo-Chinese Bank	A. Mihailovsky.	19/IV	300.
2.	7646	J. Kayalov	Tun-Sun-Sian & Co. ..	———	587.82
3.	5908	Geo. Borman Co.	Zazounov.	18/IV	863.57
4.	7035	Centennial Mill Co.	Clarkson & Co.	17/IV	71.665.70

Note.—At the day's rate of exchange 198. G. $36,194.80.

Respectfully yours,

RUSSO-CHINESE BANK,
p. p. A. FRIEDBERG,
p. p. A. OVSIANKIN.

(*b*) Letter of the Bank at Port Arthur to the National Bank of Commerce of Seattle, May 13/26, 1904, with which the draft for $36,194.80 was returned with the act of protest for non-payment of the same.

TO CLOSE IN CENTER

13/26 May 4.

674.

National Bank of Commerce,
Seattle, Wash.

Your rem'ce for coll. 11/XII-03 No. 1559/7035 G. $36,194.80 pr. 17/IV-1904 D./P.

DEAR SIRS: This had to be protested for non-payment and is herewith returned together with its deed of protest. Kindly acknowledge receipt & remit on our account to the First National Bank of your city.

Rbs. 566.25 sundry ch'ges as per following description, thus obliging.

Rbs.	271.50	3/8% comm.
"	184.25	protest
"	2.—	carriage fare
"	—.50	postage
"	108.—	billstamp
Rbs.	566.25	

52 The reason of dishonor is that the goods have not been landed here. The shipping doc'ts are being kept here pending receipt of your instructions.

Yours faithfully,

RUSSO-CHINESE BANK.
(Port Arthur Branch.)
A. D. MAMONOFF,
p. p. A. FRIEDBERG.

Enclosed:—
one bill (first)
one bill (second)
one deed of protest.

I knew A. Belinsky personally. He was Notary Public of Port Arthur.

With reference to the payment into the Russo-Chinese Bank at Port Arthur for account of Clarkson & Co. of the sum of 67,000 roubles on or about April 30th, 1904, I know that on the 17/30/IV/1904, the representative of Clarkson & Co. presented for payment a check drawn by the trading firm Ginsburg & Co. No. 1156, for Rbl. 67,000.—, which was paid by the bank in Port Arthur; which is shown by the documents of the cash section of the bank and by the books of the bank for the year 1904, fol. 216 and 217.

As shown by the cash-book of the Bank, the representative of Clarkson & Co. made on the same day the following payments:

I. Rbl. 8,489.55c. for payment of the draft of the National Bank of Commerce of Seattle, amount: G. $4,136—6% for 220 days G. $151.65=4,287.65 at the rate of exchange of Rbl. 198.—.

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II. Rbl. 33,053-53. for payment of the draft of the National Bank of Commerce of Seattle, amount: G. $16,155.20—6% for 200 days G. $538.50=G. $16,693.70, at the rate of exchange of Rbl. 198.—.

III. Rbl. 174.50.—the commission of the bank on the above drafts.

IV. Rbl. 70.—telegraph expenses for the transfer of said drafts.

V. Rbl. 60.30.—stamp duty on same.

VI. Rbl. 1.00—postage on same.

53 VII. Rbl. 25151.12 were deposited on account No. 7 of correspondents "Loro" of the firm Clarkson & Co.

At that time the value in G. 67.000 roubles was $33,838.38.

Besides the draft of G. $36,194.80.— in the portfolio of the Port Arthur Bank, towards 17/30 April, 1904, were the following drafts, drawn by the Centennial Mill on Clarkson & Co. and received for collection from the National Bank of Commerce of Seattle.

I. Draft with enclosure of 1 bill of lading, 1 invoice and 1 insurance policy, 90 days' sight, amount G. $4136.— received in letter, date 6/X. The Bank acknowledged receipt of these documents in letter date 8/21/XI/1903. Clarkson & Co. accepted this draft on 27/10/XII/1903, term 27/11/1904 old style, and information thereof was sent to the National Bank of Commerce of Seattle on the same day.

II. Draft with enclosure of 1 bill of lading, 1 insurance policy and 2 certificates, 90 days' sight, amount G. $16,155.20 received with letter, dated 26/X/1903.

The bank acknowledged receipt of these documents in letter dated 19/2/XII/1903. Clarkson & Co. accepted this draft on 8/21/XII/1903, term 8/21/III/1904 and information thereof was sent to the National Bank of Commerce of Seattle on the same day.

Though both these drafts were not paid at maturity, the bank was deprived of the possibility of executing protest for non-payment by reason of the notary having left Port Arthur.

Enclosed is the letter of the bank in Port Arthur, dated 13/26/IV/1904, these drafts were returned to the National Bank of Commerce of Seattle, and the belonging documents were kept in the bank pending receipt of further instructions.

Clarkson & Co. having paid these drafts on 17/30/IV 1904, the documents belonging to same were delivered to said firm and information was sent on the same day to the National Bank of Commerce, of Seattle. G. $151.65.—accrued on draft of G. $4136.—for 220 days at the rate of 6%, and G. $538.50 on the draft of G. $16,155.20 for 200 days at 6%. The amounts paid on the drafts and the in-
54 terests were transferred by telegraphic order, to the National Bank of Commerce, of Seattle, through the board of the bank in St. Petersburg, in a bulk sum of G. $20,981.35.

III. Draft with enclosure of 1 bill of lading and 1 insurance policy, 90 days' sight, amount G. $23,468.40.—was received with letter dated 2/I/1904. The bank acknowledged reception of these documents in a letter, dated 6/19/II/1904, and warned that it waives

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all responsibility as regards non-protest and non-payment owing to the state of siege being declared at Port Arthur.

The draft not being accepted, protest was made on 23/V/1904 and draft and protest sent by mail to the National Bank of Commerce of Seattle in letter, dated 7/20/VI/1904. The documents, belonging to this draft, were sent to the Russo-Chinese Bank at San Francisco, on 14/27/VI/1906, with instruction to remit them to the National Bank of Commerce of Seattle only on payment by the same of the expenses of the protest of the draft and of the amounts with interest accrued on the unpaid drafts of G. $36,194.80 and G. $270.

I do not know out of what funds Clarkson & Co. paid the drafts above mentioned for $4136 and $16,155.20, but I presume that they were paid out of the 67,000 roubles received by Clarkson & Co. on a check of Ginsburg & Co.

In April and May, 1904, the Bills of Exchange Statute, Edition of 1903, "General for the Whole Russian Empire," was in force.

Cross-examination:

I practically kept all the books of the Russo-Chinese Bank at Port Arthur from January 1st, 1904, to Dec. 23d, the same year.

Drafts drawn by the Centennial Mill Company upon Clarkson & Co. and sent to the Russo-Chinese Bank by the National Bank of Commerce of Seattle for collection, as well as all other drafts received were entered into the book called "Bills of Exchange received for Collection" in the following order.

1. Date of receipt of draft.
2. Number of entry.
3. Number under which the draft has been dispatched.
4. Date of letter accompanying the draft.
5. From whom received.
55 6. City wherefrom the draft has been dispatched.
7. To whose order the draft was drawn.
8. City on which the draft is drawn.
9. Date of draft.
10. Payee.
11. Terms of draft.
12. The remittents instruction.
13. Draft's amount.
14. Draft's amount in roubles.
15. Column where the date of payment of the draft or its transfer to another town was entered.

To drafts drawn by the Centennial Mill Co. in favor of the National Bank of Commerce and upon Clarkson & Co. documents were attached consisting of bills of lading, bill, insurance policy or certificate of naval insurance. Such documents were attached to the draft for $36,194.80 as I have already stated in my answers to direct interrogatories.

M. Chernin, according to the order established in the Bank, immediately submitted this draft to Clarkson & Co. for acceptance. But they did not accept it immediately and did so on 17/30, January, 1904. The draft was accepted in the bank's office in writing

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I do not know when the flour on the "Hyades" arrived. I am almost sure, however, that the "Hyades" arrived before 17/30 January, the day of the draft's acceptance.

Nobody except Clarkson & Co. knew or could know the quantity of flour stored in their warehouses on the day when military operations began between Russia and Japan.

The bill of lading with all the rest of the documents were to be delivered to Clarkson & Co. only upon the payment of the draft for $36,194.80. Neither I, nor the bank in Port Arthur made use of them, because we did not receive any flour at all.

The bank did not receive the flour for storage and did not sell such flour either to the Russian Government or Ginsburg or anybody else.

The documents attached to the draft were not surrendered to the agents of the steamship Co. They were kept by the bank during the whole time and are in the bank until now.

56 The bank never received any money from Ginsburg for the flour and never sold him such flour. Nor did it deliver flour to Ginsburg. The bank's books show no entries concerning the sale of flour to Ginsburg.

Regarding the receipt of 67,000 roubles from Clarkson & Co. on a check of Ginsburg, I don't know whether this was really paid for the cargo of flour on the steamer "Hyades." I have already attached to my deposition (see ante, page 21/22/23) the book entries and check and cash orders concerning that matter.

As to the price of flour during the siege of Port Arthur, all I know is that it was somewhat higher than before the war. But in the Government warehouses there were large stores so there was no lack of it. The price of flour is unknown to me.

The Russo-Chinese Bank did not control Clarkson & Co.'s storehouses. I personally have not once been either in Clarkson & Co.'s office nor in their storehouse.

Several days after the first bombardment of Port Arthur by the Japanese, (i. e. February 27, 1904) Messrs. Davidson, manager of the firm, and Chekovich, assistant manager, left Port Arthur. The Bank obtained information that Davidson entered into an illegal agreement with Ginsburg & Co. for the sale to the latter of a cargo of flour belonging to Clarkson & Co. At this time the Court had already left Port Arthur. In compliance with Clarkson & Co.'s request at Vladivostok the bank concurred in the annulment of the business made by Davidson, but never took upon itself the management of the firm's affairs. After Davidson left a certain Newhard was appointed manager of the firm of Clarkson & Co. in Port Arthur. The latter had to leave Port Arthur in February and then Serokoozov took his place as representative of Clarkson & Co. and settled the matter with Ginsburg & Co. according to instructions received from Clarkson & Co.

Cross-interrogatory 23. Could not the bank by the exercise of ordinary business prudence have realized for the flour sold to Ginsburg at least 100,000 roubles in the open market

Answer: As I have already answered the Port Arthur Branch had no participation whatever in the sale of flour.

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In May, 1904, the bank's correspondence in foreign lan-
57 guages was entrusted to Ezio Sandri, at present employed in the service of the Shanghai branch of the bank.

I do not recall that the Russo-Chinese Bank at Vladivostok telegraphed to the bank at Port Arthur on the 10th of May, 1904, inquiring as to whether the drafts drawn by the Centennial Mill Co. upon Clarkson & Co. had been paid. Telegraphic communication with Port Arthur was cut off on that date. No such telegram was ever sent. Nor did the Port Arthur branch wire that the draft for $36,149.80 was paid or anything to that effect.

The account of the firm of Clarkson & Co. with the Port Arthur Branch from December, 1903, to December, 1904, (except for the month of June, 1904) showed a continual debit balance.

Witness produces statement showing monthly balances as stated by the witness Friedberg. (See ante, page —.)

I do not know from what sources Clarkson & Co. made payments of money into the bank.

The Port Arthur Branch received from the National Bank of Commerce of Seattle in a letter of October 26, 1903, a draft with documents, for $16,155.20 at 90 days' sight, drawn by the Centennial Mill Co. on Clarkson & Co. with 6% per annum interest accrued since the date of the draft until date of receipt in Seattle of the amount thereof. The bank acknowledged the receipt of the draft by letter of December 19/January 2, 1903. Clarkson & Co. accepted the draft and payment was due on March 8/21/1904. But it was effected only on April 17/30/1904. On the same day the principal of the draft with accrued interest for 200 days at the rate of 6%, $538.50 as well as the sum due on another draft was transferred in a lump sum of $20,981.35 by telegraph through the Bank's Board on Landenburg, Thalmann & Co. New York. This draft was not protested at maturity, owing — the absence of the Notary from Port Arthur at that time.

I do not know when the cargo securing the draft for $16,155.20 was received in Port Arthur or to whom it was sold; and there are no entries in the bank's books regarding the sale of such cargo. The
58 bank did not sell it. The proceeds of such cargo or flour were not received by the Russo-Chinese Bank or applied by the bank toward the reduction of indebtedness of Clarkson & Co. to it.

The indebtedness of Clarkson & Co. to the bank was secured by promissory notes, which were drawn and signed by the firm in due form. I have no copy of any of these notes.

The documents accompanying these drafts were in the possession of the bank. Those securing the drafts for $16,155.20 and $4136 were delivered to Clarkson & Co. upon payment of the amounts due thereon on April 17/30, 1904.

Clarkson & Co. never applied to the bank in Port Arthur requesting that they be allowed to sell or dispose of the goods securing the above drafts.

When they paid in money the bank had to follow their instructions and without having the same it could not carry over the items

of Clarkson & Co.'s accounts. Neither could the Bank give Clarkson & Co. directions as to the manner of disposing of their moneys.

The bank did not in the early part of the year 1904 realize that Clarkson was insolvent nor did it appropriate to its own use the proceeds of flour securing the drafts it had for collection for the National Bank of Commerce. Nor did it appropriate such proceeds toward the reduction of the indebtedness of Clarkson & Co. to it.

I do not know who were the agents at Port Arthur of the steamship companies issuing the bills of lading above referred to.

During the year 1903-04 Clarkson & Co. were the agents of the "Hyades" which arrived in January, 1904. The bank first ascertained that Clarkson & Co. were the agents of the steamship company at Port Arthur April 15/28, 1904, when H. F. Ostrander of the Centennial Mill Co. requested the Shanghai branch of the bank to wire Port Arthur asking the bank there to investigate whether Clarkson & Co. had sold without payment the cargo securing the drafts drawn by the Centennial Co. This investigation proved that Clarkson & Co. were agents of the steamship company; and that they had unloaded the cargo on its arrival in Port Arthur. The Port Arthur branch wired immediately that the goods had been received by Clarkson & Co. and that they had sold the same.

59 The National Bank of Commerce was notified of the situation in regard to these drafts by correspondence between it and the Shanghai branch of the bank in August, 1904, which correspondence is as follows:

Letter of the Russo-Chinese Bank in Shanghai Dated 5/VIII/04 to the National Bank of Seattle.

Russo-Chinese Bank.

Per S. S. "Empress of China."

No. 9/2. SHANGHAI, 5th August, 1904.

The National Bank of Commerce, Seattle.

DEAR SIRS: Confirming our respects of 6th ultimo, we beg to refer to your following remittances all drawn on Messrs. Clarkson & Co. Port-Arthur, and sent by you direct to our Branch at that port for collection:

Your No. 1412 for G$ 4136.00
" " 1455 " G$16155.20
" " 1559 " G$36194.80
" " 1690 " G$23468.40

We beg to hand you herewith:

1. Copy of our telegram of 22d April to our Port-Arthur Branch.
2. Copy of the cable reply dated 23d April (received here on 1st May) sent by our Port Arthur Branch.
3. Copy of our telegram of 28 April to our Port Arthur Branch.
4. Copy of the cable reply dated 29 April (received here on 1 May) sent by our Port Arthur Branch.

These telegrams were interchanged while Mr. H. F. Ostrander, Representative of the Centennial Mill Company, Seattle, (the drawer of the bills in question) was in Shanghai.

5. Copy of letter No. 9/227 dated 16/29th April from our Port Arthur Branch.

The above copies of correspondence we are sending you at the request of Mr. Ostrander.

We have no further news from our Port Arthur Branch re-
60 garding these bills, communication with that port being at present interrupted.

We are, dear Sirs,
Yours faithfully,
(Signed) J. C. BERGENDAHL.
M. SPEELMAN.
BANQUE RUSSO-CHINOISE.

Copy of a Telegram, Dated 22d April, 1904, Sent to Port Arthur Branch from Shanghai Office.

Representative
Centennial Mill Company
Seattle
Requests us to enquire of you
What
Drafts on
Clarkson & Co. Port-Arthur
Unpaid
Telegraph total amount.

Copy of a Telegram, Dated 28th April, Sent to Port Arthur Branch from Shanghai Office.

Following is strictly private
Referring to our telegram of 22nd April 1904
Representative
Hears
Clarkson & Co. Port Arthur
Have sold
Goods
Without
Paying
Find out the truth of
This report
Telegraph the result.

61 *Copy of a Telegram, Dated 29th April, 1904, Received by Shanghai Office on 1st May, 1904, from Port Arthur.*

Referring to your telegram of 28th April 1904.
All documents are in our hand
Gold Dollars 23,468.40
Payment refused because

Goods are not landed
Remaining
Bills
Goods are in the hand of
Clarkson & Co. Port Arthur
They have sold
Payment is promised shortly.

No. 9/227. PORT ARTHUR, 16/29th April, 1904.

Russo-Chinese Bank,
Shanghai.

Nat. Bank of Comm. Seattle rem'ces for coll. (No. 1412/6488, 1455/6500, 1598/7035, 1690/7392).

DEAR SIRS: In reply to your telegram of the 15/28-IV-1904 reading "Ref. to your telegram 9/22-IV-04 Representative (Centen. Mill Co.) he fears Clarkson & Co. Port Arthur have sold goods without paying. Find out the trust of this report telegraph result."

We wired you to-day as per copy enclosed, contents of which we hereby confirm.

You will learn from said telegram that all shipping documents relative to the 4 bills in question are in our hands. The doc'ts cover the following merchandise:

Bill No. 1412/6386 G$4136.—accepted pr. 27/2/04 4000 sacks "Russo-Chinese" flour ex Pleiader, Seattle 5/X/03.

Bill No. 1455/6500 G$16155.20 accepted pr. 8/3/04 1000 sacks "Bluestem" flour 14688 sacks "Russo-Chinese" flour ex "Tremont" Seattle 25/X/03.

62 Bill No. 1559/7035 G$36194.80 accepted pr. 17/IV/04 35312 sacks "Russo-Chinese" flour ex "Hyades" Seattle 9/XII-1903.

Bill No. 1690/7392 G$23468.40 at 90 d/s D/P unaccepted 22896 sacks "Russo-Chinoise" flour ex "Pleaiader" 2/1/03.

The flour relative to the first three bills is in the hands of Clarkson & Co. and has been sold by them. They promised to take up the bills as soon as they get the money of their sale, while acceptance and payment of bill No. 1690/7392 is refused on account of the 22896 sacks flour having not been landed here.

Bills No. 1412/6386 & No. 1455/6500 could not be protested owing to the absence of the notary public at that time, and have been returned to the National Bank of Commerce of Seattle. The relative documents however are still in our hands. Bill No. 1559/7035 is due to-morrow and shall be protested if not paid.

The fact that Clarkson & Co. got into possession of the goods though the BL are in our hands is due to their being the agents for the steamers carrying same, and could in no way *to* impeded by us.

Yours faithfully,

RUSSO-CHINESE BANK.
(Port Arthur Branch.)

(Signed) P. P. OWINASKINE.
P. P. FRIEDBERG.

17/30-IV-1904.

P. S.—Bill No. 1412/6386 G$4,136.00 and No. 1455/6500 G$16,155.20 have been paid today.

(Signed) FRIEDBERG.

Copy of Letter Received from H. F. Ostrander, Seattle.

SEATTLE, July 8th, 1904.

The Managers, Russo-Chinese Bank, Shanghai, China.

DEAR SIRS: You will doubtless recall the writer's conversation early in May last with one of your good selves and you Mr.
63 Speelman at which time you promised to send to the National Bank of Commerce this city, copy of letter you had just received from your Port Arthur branch giving full particulars as to the status of certain drafts drawn by the Centennial Mill Co. on Messrs. Clarkson & Co. Port Arthur, and forwarded by the National Bank of Commerce to your Branch there for collection.

As this letter has not been received I should be greatly obliged if you would make inquiries concerning it and for the despatch of a copy thereof to the Bank here in case the letter was forwarded in due course.

Thanking you, I am

Very truly yours,

(Signed) ——— ———.

SHANGHAI, 6th August, 1904.

H. F. Ostrander, Esq., Centennial Mill Company, Seattle.

DEAR SIR: We beg to acknowledge receipt of your favor of the 8th ultimo, contents of which have been noted.

As requested, we are forwarding to-day to the National Bank of Commerce, Seattle, copies of telegrams that were exchanged, during your stay in Shanghai, between Port Arthur Branch and ourselves re. certain bills on Clarkson & Co. Port Arthur, as well as copies of the letter in question from our Port Arthur Branch No. 9/227 of 16/29th April, 1904, and trust same will enable the Bank to find out how they stand with reference to these bills.

We are, dear Sir,

Yours faithfully,

RUSSO-CHINESE BANK.

(Signed) BERGENDAHL.
SPEELMAN.

As I remember, the first draft for $52,925, drawn by the Centennial Mill Co. on Clarkson & Co. at Port Arthur was received by the Port Arthur Bank from the National Bank of Commerce in April, 1902.

64 Yes, the instruction of the National Bank of Commerce was to the effect that the drafts drawn on Clarkson & Co. were to be accepted by Clarkson & Co., and that it was to hold the documents, bills of lading, etc., securing the drafts and not deliver them to Clarkson & Co. until they were paid. But it did not concern itself

with the goods mentioned in those documents. And did not deliver or permit Clarkson & Co. to take possession of it. Clarkson & Co. appropriated the flour themselves on their own risk and responsibility.

It was not the business of the bank to look after the goods and in fact, it did not know in what manner Clarkson & Co. made operations on these drafts.

Only the consignor is mentioned in the bill of lading accompanying the draft for $36,194.80. The consignee is not mentioned. This bill of lading was provided only by the inscription of the firm Centennial Mill Co. There are no other endorsements.

No, the bank had no legal right to take into its possession or control the flour covered by such bills of lading without having instructions to that effect from the National Bank of Commerce.

In December, 1903, the Port Arthur Branch of the Russo-Chinese Bank opened to Clarkson & Co. a credit up to 50,000 roubles, covered by bills of exchange drawn by Clarkson & Co., in Port Arthur on the same firm in Vladivostok, payable 2,000 roubles January 15/28 and 3,000 roubles on the 15/28 of each month thereafter. Clarkson & Co. had no right to exceed the credit opened to them, and there existed no agreement between them and the bank in virtue whereof they could dispose of the cargo mentioned in the documents kept by the bank.

Clarkson & Co. paid the bank at Port Arthur no money between March 26th and April 1st, old style, 1904.

Yes, the bank has records showing that it notified the National Bank of Commerce of the non-payment of the drafts for $4,136 and $16,155.20 on April 13/26, 1904. This was done by letter. (See ante, page 31.)

The drafts for $4,136 and $16,155.20 could not be protested owing to the absence of the notary from Port Arthur at the time
65 when they were due, and they were returned to the National Bank of Commerce in the letter above mentioned, together with two copies of a certificate of the absence of the Notary from Port Arthur.

The draft for $36,194.80 was protested and returned to the National Bank of Commerce together with the protest in letter dated May 13, 26, 1904. The draft for $36,194.80 together with the deed of protest was received from the Notary in Port Arthur at the time when communication with Port Arthur was cut off from the shore as well as from the seaside.

The amounts paid on the drafts for $4,136 and $16,155.20 were remitted by the Port Arthur Branch by telegraph on April 17/30, 1904.

The bank did not prior to the sale of flour to Ginsburg advance to Clarkson & Co. money with which the drafts for $4,136 and $16,-155.20 were paid. Nor did it out of the proceeds of the sale of the flour shipped on the "Hyades" reimburse itself for the money thus advanced.

I know the date at which the Japanese Government returned to the Russo-Chinese Bank the papers and effects of the Bank that were

captured at the time Port Arthur fell because as soon as permission from the Japanese Government had been received the representative of the bank Mr. A. Friedberg left for Port Arthur in February, 1906, to solicit of the Japanese authorities that books, papers and values belonging to the Russo-Chinese Bank be returned. The same were returned in March, 1906.

In my capacity as officer of the bank in 1904 and through being present at the time when the Japanese military authorities occupied the bank's building and confiscated whatever it contained and having given explanation to the Japanese authorities I know what books, documents, etc., were confiscated by the Japanese. And after receipt of the same in St. Petersburg I personally set them to rights. Upon examination all that had been confiscated in the bank's building in Port Arthur were returned.

I am not a lawyer by profession.

I know what official appointment A. Belinsky held by virtue of the office, though I have never seen his official appointment.

66 Thereupon the plaintiff read in evidence the deposition of PAUL BOCK, taken and certified before the Honorable James W. Ragsdale, United States Consul at St. Petersburg, Russia, and certified by him in his official capacity. The deposition of Paul Bock, a witness on behalf of the plaintiff, was as follows:

Deposition of Paul Bock, on Behalf of Plaintiff.

My name is Paul Bock; I am forty-six years old. I reside at St. Petersburg and am manager of the Russo-Chinese Bank at St. Petersburg. I have been in that employment since the year 1896.

The head office of the Russo-Chinese Bank at St. Petersburg had in 1894 between 45 and 50 different branches located at various points in Russia and Siberia, Paris, San Francisco, and Calcutta, and had agencies at London, New York, Bombay and Chefoo.

Interrogatory 5. State what you know as an officer of the Russo-Chinese bank of the transaction concerning a certain draft for $36,194.80 drawn by the Centennial Mill Company upon Clarkson & Co. of Port Arthur and transmitted to the Port Arthur Branch of the Russo-Chinese Bank.

Answer. On April 9/22, 1904, the National Bank of Commerce enquired by wire about the fate of their remittance on Port Arthur and on April 17/30, on receipt of the telegraphic reply from Port Arthur the bank at St. Petersburg wired to the National Bank of Commerce that the same had not been paid by Clarkson & Co. but the latter promised to pay shortly. This telegram was confirmed by letter.

Later the National Bank of Commerce claimed that the draft for $36,194.80 had been paid by Clarkson & Co. to which the bank at St. Petersburg replied by letter to the effect that by reason of the interruption of communication with Port Arthur it was impossible to trace the matter at that time. The National Bank of Commerce

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continued to insist that either the money or documents in duplicate be returned to it immediately. After considerable correspondence and on the 27th October/9th November, 1904, the Russo-Chinese Bank in order to discontinue the disagreeable incident decided to remit and did remit the sum claimed by the National Bank
67 of Commerce, conditionally by letter. The sum remitted was $36,013.70.

Upon receipt of the draft for $36,013.70 and about December 16/29, 1904, the National Bank of Commerce claimed interest on the draft and the same was remitted in a sum of $2,298.49, which sum included $181 10, charges theretofore retained.

In June, 1906, when the books and documents of the Port Arthur branch were received in St. Petersburg, I examined the books and finding that they did not show that the draft for $36,194.80 had been paid by Clarkson & Co. but on the contrary had been protested for non-payment and the draft with the deed of protest mailed to the National Bank of Commerce and that the documents attached to the draft were among the documents of the Port Arthur branch recovered from the Japanese, for the Bank I made demand upon the National Bank of Commerce to refund the amount of the two remittances before mentioned with accrued interest.

On April 9/22, 1904, the St. Petersburg bank received a telegram from the National Bank of Commerce in regard to its draft. This telegram is produced and attached to my deposition, being in cipher with the translation.

The bank at St. Petersburg wired at once to Port Arthur for information and on receipt of the reply telegraphed to the National Bank of Commerce on 17/30 April, as follows:

"As far as we can judge Clarkson financial standing there is no change. Bills Port Arthur No. 1588, No. 1690 payment refused. Goods have not yet arrived. Remaining bills Port Arthur Clarkson promises to pay shortly."

This telegram as well as the letter previously referred to were confirmed by letters mailed to the National Bank of Commerce, copies of which letters are hereto appended.

Although there was war between Russia and Japan at the time of the receipt of our first information from the National Bank of Commerce, and Port Arthur was blockaded by the Japanese navy, the Port Arthur branch of the Russo-Chinese Bank continued to work as before. This state of affairs continued until the capitulation of Port Arthur which took place December 20th, 1904/January 5th,
68 1905. A few days later the Japanese military authorities took possession of the Russo-Chinese Bank at Port Arthur and confiscated all books and documents of the bank. The books and documents were recovered from the Japanese authorities in March, 1906, and are in the office of the bank at St. Petersburg.

Charles Richter and Alexander Friedberg were officers of the Russo-Chinese Bank at Port Arthur, holding power of attorney. Alexander Drozdov was an employee of the bills department of that bank.

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The bank at St. Petersburg did have correspondence with the National Bank of Commerce of Seattle in regard to the draft transaction and I annex herewith its files for the years 1904-5-6 containing all the letters and telegrams received by the Russo-Chinese Bank at St. Petersburg from the National Bank of Commerce of Seattle and the copies of the replies, taken from the letter copying-books into which the Russo-Chinese Bank copied the letters and telegrams it sent to the National Bank of Commerce concerning said draft.

As I said before on October 27/November 9, 1904, the Russo-Chinese Bank at St. Petersburg mailed a check on Messrs. Ladenburg, Thalmann & Co. New York, for $36,013.70 to the National Bank of Commerce with letter of that date and later on, receiving a further demand of the National Bank of Commerce for interest and a refund of charges the bank mailed another check for $2,298.49, Dec. 16/29, 1904, with letter of that date.

I have examined the books and records of the bank at Port Arthur.

The National Bank of Commerce of Seattle has not repaid the Russo-Chinese Bank the sums of money above mentioned, as paid on account of the draft for $36,194.80 with accrued interest thereof or any part thereof.

I annex copy of the letter of the Port Arthur Branch of the Russo-Chinese Bank, date 13/26 May, 1904, addressed to the National Bank of Commerce of Seattle, certified by the Consul General of the United States of America at St. Petersburg, on January 11th, 1907, as follows:

69 Copy.

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13/26, May 4.

National Bank of Commerce, Seattle, Wash.:

Your remi'ce for coll. 11/XII—03 #1559/7035 G. $36.194.80 pr. 17/IV—1904 D./P. On Clarkson & Co., Port Arthur.

DEAR SIRS: This had to be protested for non-payment and is herewith returned together with its deed of protest. Kindly acknowledge receipt and remit on our account to the first National Bank of your city.

Rbs. 566.25 sundry ch'ges as per following description, thus obliging.

Rbs.	271.50	⅜% comm.
"	184.25	protest
"	2.—	Carriage fare
"	—.50	postage
"	108.—	billstamp
Rbs.	566.25.	

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The reason of this dishonor is that the goods have not been landed here. The shipping doc'ts are being kept here pending receipt of your instructions.

Yours faithfully,

RUSSO-CHINESE BANK.
(Port-Arthur Branch).

(Signed) A. D. MAMONOFF,
p. p. FRIEDBERG.

Enclosed:
one bill (first)
one bill (second)
one deed of protest.

Consulate-General of the United States of America,
St. Petersburg, Russia.

I, Ethelbert Watts, Consul-General of the United States of America within and for the City and Empire aforesaid, do hereby certify that I have compared the above with the text on Page 306 of the Press-copy Book #15 of the Russo-Chinese Bank of the Port-Arthur Branch and have found the above to be a true and verbatim copy of the same.

70 In witness whereof I have hereunto set my hand and affixed the seal of this Consulate-General this 11th day of January, A. D. 1907.

[SEAL.] AMERICAN CONSULATE-GENERAL,
St. Petersburg, Russia.
ETHELBERT WATTS, *Consul-General.*

N. F.

(Stamp:) American Consular Service. $2 Fee Stamps. 11/1/07.

Cross-examination:

During the period of time between December 1st, 1903, and August 1st, 1904, I was in St. Petersburg. St. Petersburg was my station.

My knowledge of the transactions between the Russo-Chinese Bank at Port Arthur and the National Bank of Commerce relating to the drafts for $4,136 and $16,155.20 and $36,194.80 drawn by the Centennial Mill Co. in favor of the National Bank of Commerce upon Clarkson & Co. at Port Arthur is acquired from an examination of the books and records of the Bank; not from personal knowledge.

And thereupon the letters and telegrams attached to the deposition of the witness Paul Bock were read to the jury as follows:

SEATTLE, WASH., Mar. 15, '04.

The Manager Russo-Chinese Bank, St. Petersburg, Russia.

DEAR SIR: We are in receipt of your favor of February 25th, enclosing your draft on San Francisco for Roubles 8,465.12 for which accept thanks.

CLOSE IN CENTER

In advising you your Vladivostok Branch probably failed to request that you remit us in New York funds, San Francisco not being a par point, exchange being at a discount of from G. $1.00 to G. $1.25 per M.

71 Hereafter should any further transfers be made from either Port Arthur or Vladivostok for our account through your good selves, would respectfully request that you send us New York funds.

Very respectfully yours,

R. R. SPENCER.

The National Bank of Commerce.

SEATTLE, WASH., Apr. 21, '04.

The Manager Russo-Chinese Bank, St. Petersburg, Russia.

DEAR SIR: I cabled you to-day as per enclosed confirmation. We are carrying for our various customers' Bills, a list of which is enclosed herein, showing approximate maturity and amounts.

Since trouble commenced in the Far East, Port Arthur has been cabling us remittances through you, not trusting to the mails. If that is still their policy some of the items are considerably past due.

We received a rather disquieting advice to-day, that Clarkson or his Agent, had become possessed of the flour and disposed of it, not accounting for the proceeds. Of course we do not know that this is true, but the fact that we have received no remittances of late would indicate that something is wrong.

All of the items are in the hands of your two Branch Of-ces. We have received no advice from them, telegraphic or otherwise, in regard to the past due items. If the reports are true, we do not understand why your Offices did not notify us on the Maturity of the drafts.

Will you kindly use your facilities for ascertaining the exact conditions, and if the draft for G. $16,155 accepted to mature March 8th, was not paid, why we were not advised of the fact promptly.

We have had a great deal of trouble with your Port Arthur Office. They have held non-interest bearing drafts as long as sixty days without procuring acceptance, or advising us of their

72 dishonor, and then have cabled us the fact that acceptance was refused at our expense.

We attempted to cable Port Arthur, but the Companies here advise us that the line is closed to mercantile use.

When you have completed the transaction, if you will advise us as to the amount of expense incurred for telegrams, etc., will remit your San Francisco or New York Office as you may request. Please see that we are protected in the premises in the usual commercial custom.

Very respectfully,

R. R. SPENCER.

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PORT ARTHUR.

Date of Draft.	Drawer.	Drawee.	Term.	Amount.	Accepted to mature.
Oct. 6/03	Centennial Mill Co.	Clarkson & Co.	90 d/s	G$4,136.00	Feb. 27/04
Oct. 26/03	" " "	"	90 d/s	16,155.20	Mar. 8/04
Dec. 11/03	Sprague Roller Mills	"	90 d/s	1,100.00	Apr. 17/04
Dec. 11/03	Centennial Mill Co.	"	90 d/s	36,194.80	Apr. 17/04
Dec. 31/03	Sprague Roller Mills	"	90 d/s	1,100.00	No notice of acceptance.
Dec. 10/03	Armour & Company	G. S. Zozounoff	30 d/s	270.	"
Dec. 31/04	M. J. Connell	Economical Arm of the Military & Police	30 d/s	269.60	"
Jan. 2/04	Centennial Mill Co.	Clarkson & Co.	90 d/s	23,468.40	"
Jan. 5/04	Borden's Con. Milk Co.	G. S. Zozounoff	30 d/s	375.	"
Jan. 5/04	" "	"	30 d/s	375.	"
Jan. 25/04	Armour & Company	"	30 d/s	270.00	"
Feb. 8/04	"	Peteritz Bros.	30 d/s	283.10	"

VLADIVOSTOK.

Dec. 11/03	Centennial Mill Co.	Dong Shun	60 d/s	4,175.16	"
Dec. 11/03	" " "	"	90 d/s	4,196.09	

ST. PETERSBURG, 10/23 April, 1904.

National Bank of Commerce, Seattle.

GENTLEMEN: We beg to acknowledge receipt of your cable of the 22nd inst. worded as follows:

"Certain unfavorable reports are being circulated with regard to Clarkson, Port Arthur. Ascertain why has not remittance been sent us by Sinorusse. Where are the bills of lading? Bills amount to Port Arthur $82,000.—Vladivostok $8,000.—. Telegraph as soon as possible cannot communicate with because telegraph line is broken, will be responsible for the expense."

We have at once wired your enquiry to our Port Arthur
73 and Vladivostok Branches and we shall not fail to pass on to you their answers, when received.

We remain, gentlemen,
Yours faithfully,

RUSSO-CHINESE BANK.

ST. PETERSBURG, 19/2nd May, 1904.

National Bank of Commerce, Seattle.

GENTLEMEN: With reference to your enquiry by cable of 22nd April ult. we have cabled you on 17/30 April as follows:

"As far as we can judge Clarkson financial standing there is no change bill Port Arthur No. 1588 No. 1690 payment refused goods have not yet arrived remaining bills Port Arthur Clarkson promise to pay shortly Sinorusse Vladivostok can find no trace of matter mentioned in your telegraph telegraph us when did you send documents"

which we confirm.

We are now awaiting your answer by telegram and remain, Gentlemen,
Yours faithfully,

RUSSO-CHINESE BANK.

21/4th May, 1904.

The National Bank of Commerce, Seattle, Wash.

Your remittance for collection 11/1—1904.
No. 1601/7378 G. $375.—on G. S. Sozounoff, Port Arthur.
No. 1607/7379 G. $375.—on G. S. Sozounoff, Port Arthur.

DEAR SIRS: Please note that at the request of our Shanghai Branch who wrote us as follows:—

"No. 9/79. The Representative of Borden's Condensed Milk Co, New York called upon us with reference to 2 drafts for G. $375.—each on G. S. Zozounoff, P./Arthur, against 100c. each of condensed milk which should have been received from you through the National Bank of Commerce, Seattle. He informs us that these goods are in Shanghai and asks that you should send us the
74 relative drafts and documents and he will pay them here and take delivery of the cargo; he says such an arrangement

has been made with your good selves in case of trouble * * *" we have sent them the above two bills and documents to be collected at Shanghai, and instructed them to remit you a draft on New York in cover of proceeds.

Trusting that you will find this to be in order, we remain, dear sirs,

Yours faithfully,

R. C. B.
PORT ARTHUR BRANCH.

ST. PETERSBURG, 22/5th May, 1904.

The National Bank of Commerce, Seattle, Wash.

Registered.

GENTLEMEN: By telegraphic order from our Vladivostok Branch, we are to remit you:

Rs. 8,500,—less
Rs. 31.88 commission 3/8%
" 34.88 " 3,—cost of Vladivostok's wire.

Rs. 8,465.12 at exch. 196 $4,318.94 which please find herewith in a cheque on New York 2208.

Kindly acknowledge receipt of same and oblige,

Yours faithfully,

RUSSO-CHINESE BANK.

ST. PETERSBURG, 28/11th May, 1904.

The National Bank of Commerce, Seattle, Wash.

GENTLEMEN: We acknowledge receipt of your letter of the 21st April enclosing a list of your remittances to our Port Arthur and Vladivostok Branches.

You will have received in the meantime our wires of the 17/30th April in answer to your cable to us dated April 22nd. However, we shall write to our Port Arthur Branch, requesting from them a detailed answer to your enjuiry.

75 We beg to point out that you- above-said cable mentioned a remittance to our Vladivostok Branch of $8,000.— o/Clarkson & Co. which remittance our Branch informed us they could not trace (as we wired you on the 17/30th April). But we find from your list that you remitted to Vladivostok on the 27/11th December:

$4,175.16 o/Don Shun
$4,196.09 "

Would not the cheque for Rs. 8,500 ($4,318.94) that we remitted you the 22/5th inst. be in payment of part of those drafts? The cost of our telegrams to Port and Vladivostok, of our Branches answers, and of our cable to you dated 17/30th March amounts to:
Rs. 54.50 at 196.

$27.80 which please remit for our account to Messrs. Ladenburg, Thalmann & Co., New York.

We remain, Gentlemen,

RUSSO-CHINESE BANK.

National Bank of Commerce.

SEATTLE, WASH., May 23, 1904.

The Manager Russo-Chinese Bank, St. Petersburg, Russia.

DEAR SIR: We beg to acknowledge receipt of your favor of May 5th enclosing New York draft for G. $4,138.94, cabled you from your Vladivostok Branch for our credit.

Very respectfully,

R. R. SPENCER.

ST. PETERSBURG, 12/25 June, 1904.

The National Bank of Commerce, Seattle, Wash.

Registered.

DEAR SIRS: By telegraphic order from our Vladivostok Branch, we are to remit you:

rs. 8,500.—less		
76	Rs. 31.88	commission 3/8%
34.88	3.	Cost of Vladivostok's wire
Rs. 8,465.12 at exch. 196		

U. S. $4,318.94 which please find herewith in a cheque on New York No. 2283.

Kindly acknowledge receipt of same and oblige, dear sirs,

Yours faithfully,

RUSSO-CHINESE BANK.

13/26 May, 1904.

The National Bank of Commerce, Seattle, Wash.

Your remittance for Coll. II/XII—30.
No. 1559/7035 G. 36.194.80 pr. 17/1V—1904.
D./P. on Clarkson & Co. Port Arthur.

DEAR SIRS: This had to be protested for non-payment and is herewith returned together with its deed of protest. Kindly acknowledge receipt and remit on our account to the First National Bank of your City.

Rbs. 566.25 Sundry charges as per following description, thus obliging

Rbs. 271.50 ⅜% comm.
184.25 protest
2.— carriage fare
.50 postage
108.—

Rbs. 566.25

the reason of dishonor is that the goods have not been landed here. The shipping doc'ts are being kept here pending receipt of your instructions.

Yours faithfully,
R. C. B., PORT ARTHUR BRANCH.

enclosed one bill (first)
" " (second)
" deed of protest

77 7/20th June, 1904.

The National Bank of Commerce, Seattle, Wash.

Your remittances for collection sent us on the

10/XII/03 No. 1554/7052 G $270.—at 30 d/s D/P on G. S. Zozounoff.

31/XII/03 No. 1558/7396 G $1100.—at 90 d/s D/P on Clarkson & Co.

31/XII/03 No. 1587/7397 G $269.60 at 30 d/s on Sec. Ecom. des Offi.

2/1/04 No. 1590/7392 G $23468.40 " 90 d/s D/P on Clarkson & Co.

DEAR SIRS: These had to be protested for non-acceptance and are herewith returned. Kindly acknowledge receipt, and remit on our account to Messrs. Ladenburg Thalmann & Co. New York Rs. 410.04 Sundry charges as per following description, thus obliging.

on bill	No. 1554.	No. 1588.	No. 1587.	No. 1690	
comm. ⅜% ...	2.01	8.17	2.	174.26	
protest	6.	11.05	5.95	121.05	
billstamp	.85	3.30	.90	70.50	
postage	.50	.50	.50	.50	
carriage fare for all four bills	....	....	....	....	2.—
	9.36	23.02	9.35	366.31	2.—

The shipping documents are kept here pending receipt of your instructions.

Yours faithfully,
R. C. B., PORT ARTHUR BRANCH.

Enclosed:
4 bills.
4 deeds of protest.

78 National Bank of Commerce.

SEATTLE, WASH., July 7, '04.

The Manager, Russo-Chinese Bank, St. Petersburg, Russia.

DEAR SIR: We now have the following drafts in the hands of your Port Arthur Agency, besides several small ones on other Parties which are past due and unpaid.

Mr. Clarkson advises the drawers of these drafts that all were paid before maturity. Can you trace this matter for us? The particulars of the larger drafts in question are as follows:

Dec. 11, '03 d/s Clarkson & Co. G $36,194.80.

Dec. 31, '03 90 d/s Clarkson & Co. G $1,100.00.

Jan. 2 '04 d/s Clarkson & Co. G $23,468.04.

There is thus outstanding and past due over G $60,000.—of this paper.

We dislike to trouble you in the premises, but all letters addressed by us to Port Arthur are returned.

Very respectfully,

——— ———.

ST. PETERSBURG, 10/23d July, 1904.

The National Bank of Commerce, Seattle, Wash.

DEAR SIRS: We have duly received your favor of the 7th July which had our best attention.

We are unable for the present to correspond with Port Arthur and are not in a position to trace the matter you refer to. As soon as we find it possible to investigate that subject, we shall not fail to revert to it.

We remain, dear sirs,

Yours truly,

RUSSO-CHINESE BANK.

The National Bank of Commerce.

SEATTLE, WASH., Aug. 4, 1904.

The Manager, Russo-Chinese Bank, St. Petersburg, Russia.

DEAR SIR: We are in receipt of your favor of June 25th,
79 enclosing New York draft for G $4,138.94 in payment of a draft for 8,500 roubles sent your Vladivostok Office.

Very respectfully yours,

R. R. SPENCER.

The National Bank of Commerce.

SEATTLE, WASH., July 12, 1904.

The Manager, Russo-Chinese Bank, St. Petersburg, Russia.

DEAR SIR: We are still without any returns from the 90 days' sight draft, dated December 11th, 1903, drawn on Clarkson & Co. for

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G $36,194.80 and sent to your Port Arthur Office. Sometime since we sent you a list of drafts on various parties long since overdue, from which we have received no returns.

Mr. Thompson, president of the Centennial Mill, has written Mr. Clarkson in regard to his drafts and I now have before me four letters from Mr. Clarkson complaining of Mr. Thompson's letters, and asserting that all of his drafts were paid in to your Port Arthur office one before maturity. The particular one in question, six days priod thereto. I quote from his letters which are very long and circumstantial as follows:

Under date of May 10, he writes:

"In regard to our drafts will say, that we have paid every one of your drafts promptly. In fact the last one calling for Rbls. 74,000 for flour ex 'Hyades' (the one in question) was paid some six days before it came due. At our request the Russian Chinese Bank here telegraphed to their branch in Port Arthur and among other things the Port Arthur bank notified the Bank here that they had received money on our account and had applied it to take up your draft for the Hyades flour."

And again having reference to the same draft and under date of June 15th, Mr. Clarkson writes:

"In regard to the last draft which amounted to some Rs. 74,000 covering Hyades flour will say, we have telegraphic advice from bank at Port Arthur that this was also paid."

From the above statements there is evidently something wrong somewhere. Either Mr. Clarkson is not stating facts or your
80 Port Arthur office has retained funds belonging to this institution.

We respectfully request that you instruct your office at Port Arthur or Harbin to immediately do one of two things, remit us the amount of the draft plus interest to estimated date of return of funds here or return us the bills of lading and drafts in duplicate with the statement of your Manager that Mr. Clarkson has not paid them as stated by him. In the latter event we should like to know what disposition has been made of the flour. We would also request that you instruct them to report on all other of our drafts in their hands and for which payment has not been made to us.

In conclusion we desire to state further in regard to your Port Arthur Branch that we have done a great deal of business with them prior to the outbreak of hostilities. That in thirty-three years of banking experience the writer has never had as much trouble as with transactions through this agency. They have repeatedly retained drafts in their possession which did not draw interest from two to three months without securing acceptance or protesting and returning drafts, simply favoring their customers at our expense. This has also happened at your Vladivostok Agency. In remitting us they almost invariably remitted short, sometimes as much as thirty days' interest.

I finally wrote them that conditions were unbearable and as we were compelled to send them the items, there being no other Bank there, and if they did not cure the evils complained of that I should

TO CLOSE IN CENTER

take the matter up with St. Petersburg. This had a salutary effect and from that time on we had but little to complain of until since the outbreak of hostilities.

I dislike very much to enter complaints but we expect in the future to do considerable business both in Port Arthur and Vladivostok and we would very much like to transact it with as little friction as possible.

Thanking you in advance for your prompt attention to the foregoing, I remain,

Very respectfully yours,

R. R. SPENCER.

Per S. S. "Empress of China," Shanghai 5th August, 1904.

81 No. 9/2.

The National Bank of Commerce, Seattle.

DEAR SIRS: Confirming our respects of 6th ultimo, we beg to refer to your following remittances all drawn on Messrs. Clarkson & Co., Port Arthur, and sent by you direct to our Branch at that Port for collection:

Your No.	1412	for G. $4136.00
"	1455	G. $16155.20
"	1559	G. $36194.80
"	1690	G. $23486.40

We beg to hand you herewith:

1. Copy of our telegram of 22nd April to our Port Arthur Branch.
2. Copy of the cable reply dated 23rd April (received here on 25th April) sent by our Port Arthur Branch.
3. Copy of our telegram of 28th April to our Port Arthur Branch.
4. Copy of the cable reply dated 29th April (received here on 1st May) sent by our Port Arthur Branch.

These telegrams were interchanged while Mr. H. F. Ostrander, representative of the Centennial Mill Company, Seattle (the drawers of the bills in question) was in Shanghai.

5. Copy of letter No. 9/227 dated 6/29th April from our Port Arthur Branch.

The above copies of correspondence we are sending you at request of Mr. Ostrander.

We have no further news from our Port Arthur branch regarding these bills, communication with that port being at present interrupted.

We are, dear sirs,

Yours faithfully,

(Signed) J. C. BERGENDAHL.
M. SPEELMAN.

Enclosure.

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82 *Copy of a Telegram Dated 22nd April, 1904, Sent to Port Arthur Branch from Shanghai Office.*

Representative
Centennial Mill Company
Seattle
Request- us to *re*quire of you
what
draft on
Clarkson & Co. Port Arthur
Unpaid
Telegraph total amount.
Enclosure.

Copy of a Telegram, Dated 23rd April, 1904, Received by Shanghai Office on 25th Idem., from Port Arthur Branch.

Referring to your telegram of the 22nd April.
Gold dollars 79,954.40.

Copy of a Telegram, Dated 28th April, Sent to Port Arthur Branch from Shanghai Office.

Following is strictly private
Referring to our telegram of 22nd April, 1904
Representative
Hears
Clarkson & Co. Port Arthur
Have sold
Goods
Without
Paying
Find out the truth of
This report
Telegraph the result.
Enclosure.

Copy of a Telegram, Dated 29th April, 1904, Received at Shanghai Office on 1st May, 1904, from Port Arthur.

Referring to your telegram of 28th April 1904
All documents in our hand
83 Gold Dollars 23,468.40
Payment refused because
Goods are not landed
Remaining
Bills
Goods are in the hands of

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Clarkson & Co. Port Arthur
They have sold
Payment is promised shortly
Enclosure.

No. 9/227. PORT ARTHUR, 16/29th April, 1904.

Russo-Chinese Bank, Shanghai:

Nat. Bank of Com. Seattle rem'ces for coll.
No. 1412/6386
1455/6500
1599/7035
1690/7322

DEAR SIRS: In reply to your telegram of the 15/28-IV-1904 reading:

"Ref. to your telegram 9/22-IV-04 Representative (Centen. Mill Co.) he fears Clarkson & Co. Port Arthur have sold goods without paying. Find out the truth of this report telegraph result."

—we wired you today as per copy enclosed, contents of which we hereby confirm.

You will learn from said telegram that all shipping documents relative to the 4 bills in question are in our hands. The docts cover the following merchandise:

Bill No. 1412/6386 G. $1436 accepted pr 27/2/04 400 sacks "Russo-Chinese" flour ex Pleiader Seattle 5/x/03.

Bill No. 1599/7035 G. $36194.80 accepted pr 17/IV/04 100 sacks "Blue stem" flour 14688 sacks "Russo-Chinese" flour "Tremont" Seattle 25/x/03.

Bill No. 1599/7035 G. $36194.80 accepted pr 17/IV/04 35312 sacks "Russo-Chinese" flour ex "Hyades" Seattle 9/XII-1903.

84 Bill No. 1690/7392 G. $23468.40 at 90 d/s D/P (unaccepted) 22896 sacks "Russo-Chinese" flour ex "Pleaider" 2/1/03.

The flour relative to the first three bills is in the hands of Clarkson & Co. and has been sold by them. They promised to take up the bills as soon as they get the money of their sale, while acceptance and payment of bill No. 1690/7392 is refused on account of the 22896 sacks flour having not been landed here.

Bills No. 141/6386 & No. 1455/6500 could not be protested owing to the absence of the notary public at that time, and have been returned to the National Bank of Commerce, Seattle, the relative documents however are still in our hands. Bill No. 1569/7035 is due tomorrow and shall be protested if not paid.

The fact that Clarkson & Co. got into possession of the goods though the B/L are in our hands is due to their being the agents for the steamers carrying same, and could in no way *to* impeded by us.

Yours faithfully,

RUSSO-CHINESE BANK,
(Port Arthur Branch.)

(Signed) p. p. OWIASKINE.
p. p. FRIEDBERG.

17/30/IV-1904

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P. S.—Bill No. 1412/6386 G $4,136.00
& " 1455/6500 G $16,155.20
—have been paid today.
(Signed) FRIEDBERG.

Enclosure.

Copy of Letter Received from H. F. Ostrander, Seattle.

SEATTLE, July 8th, 1904.

The Managers, Russo-Chinese Bank, Shanghai, China.

DEAR SIRS: You will doubtless recall the writer's conversation early in May last with one of your goodselves and your Mr.
85 Speelman at which time you promised to send to the National Bank of Commerce this city, copy of letter you had just received from your Port Arthur Branch giving full particulars as to the status of cetrain drafts drawn by the Centennial Mill Co. on Messrs. Clarkson & Co. Port Arthur and forwarded by the National Bank of Commerce to your branch there for collection.

As this letter has not yet been received I should be greatly obliged if you would make inquires concerning it and for the dispatch of a copy thereof to the Bank here in case the letter was forwarded in due course.

Thanking you, I am,
Very truly yours,
(Signed) —— ——.

Enclosure.

SHANGHAI, 6th August, 1904.

H. F. Ostrander, Esq., Centennial Mill Company, Seattle.

DEAR SIRS: We beg to acknowledge receipt of your favor of the 8th ultimo, contents of which have been noted.

As requested, we are forwarding today to the National Bank of Commerce, Seattle, copies of telegrams that were exchanged, during your stay in Shanghai, between Port Arthur Branch and ourselves re certain bills on Clarkson & Co. Port Arthur as well as copy of the letter in question from our Port Arthur Branch No. 9/227 of 16/29th April 1904, and trust same will enable Bank to find out how they stand with reference to these bills.

We are, dears sirs,
Yours faithfully,

(Signed) RUSSO CHINESE BANK.
BERGENDAHL.
SPEELMAN.

The National Bank of Commerce.

SEATTLE, WASH., August 25, 1904.

The Manager, Russo-Chinese Bank, St. Petersburg, Russia.

86 DEAR SIRS: We are in receipt of a letter from your Shanghai Office, containing copies of telegrams and corre-

TO CLOSE IN CENTER

spondence passing between your Shanghai office and that at Port Arthur, in one of which dated the 29th of April, your Port Arthur Office wires Shanghai, "Referring to your telegram of the 28th of April, 1904, all documents in our hand gold dollars 23,468.40 payment refused because goods are not landed, remaining bills, goods are in the hands of Clarkson & Co. Port Arthur. They have sold, payment is promised shortly" and confirming in a letter under same date, and stating "The flour relative to the first three bills (one of which is the bill in default) is in the hands of Clarkson & Company and has been sold by them. They promised to take up the bills as soon as they get money out of their sale."

We have in our hands an affidavit made by an employee of Mr. Clarkson, in which he states that they have been in the habit (the Bank being cognizant of the fact) of taking possession of merchandise and disposing of same, oft times without even accepting the bills.

The bill in question was dated December 11th, should have arrived in Port Arthur on or before January 15th, and was not accepted until April 17th, or three months later. Meanwhile we received no notice of its dishonor or protest. This certainly shows unexcusable negligence on the part of that office.

Our client is finding serious fault with us in that we have not pressed either the collection of these bills, or return of documents before this.

We would call your attention to our letter of August 4th, and must insist that either the money or documents, in duplicate, be returned to us immediately. It takes quite a little while to hear from you and to avoid any further correspondence, would state that if our request is not complied with, we shall take steps in this country to enforce our rights against your Agency here, which I sincerely hope will not become necessary, as we do like to have our relations with our correspondent banks of the friendliest character.

Respectfully yours,

R. R. SPENCER.

87 ST. PETERSBURG, 13/26 August, 1904.

The National Bank of Commerce, Seattle, Wash.

DEAR SIRS: We beg to acknowledge receipt of your letter of 4th August referring to drafts on Messrs. Clarkson & Co.

We can only say in answer, that our communication with Port Arthur being interrupted, as we told you on June 10, 23d, we have no means of tracing the matter at present.

We regret very much not to be able to give you the requested information, and remain, dear sirs,

Yours faithfully,

RUSSO CHINESE BANK.

National Bank of Commerce.

SEATTLE, WASH., Sept. 1, 1904.

The Manager, Russo-Chinese Bank, St. Petersburg, Russia.

DEAR SIR: Frank Waterhouse, Agent for Dodwell & Co., Ltd., who in turn are Agents for the Steamship Companies carrying the flour to Messrs. Clarkson & Company, has received a cablegram from Shanghai, of which the following is a copy:

"Clarkson, Shanghai in possession of Russo-Chinese Bank certificate that all Centennial Mill Company's drafts are paid with exception of Pleiades. We will send copies certificated by American Consul."

This cablegram comes from Dodwell & Company Litd., at Shanghai.

The "Pleiades" flour is that which was not unloaded at Port Arthur, excepting a small part, but was carried on to Chefoo. This cablegram has reference to the "Hyades" flour.

We cannot understand that situation. Clarkson has at all times claimed this draft as paid. We have letters from your eastern offices, one of which state- that the flour was taken by the Russian Government and would probably be paid for at the end of the war; another from the same source states that Clarkson had taken the flour
88 without the formality of taking up the bills of lading, had sold it and had promised payment as soon as he was paid. And now comes a cablegram from perfectly responsible parties stating that Clarkson has the certificate of your bank that the drafts are paid.

Our experience in this case is an entirely new and very novel one to us.

R. R. SPENCER.

National Bank of Commerce.

SEATTLE, WASH., Sept. 13, 1904.

The Manager, Russo-Chinese Bank, St. Petersburg, Russia.

DEAR SIR: Your favor of the 26th of August received, contents noted and unsatisfactory. While we are well aware that you have no means of communicating with Port Arthur, we are also aware that all documents have been removed by the Bank to Harbin with which point you have both telegraphic and mail communication.

Before taking any action, we will await your answer to our letters of August 25th, and September 1st.

Very respectfully,

R. R. SPENCER.

ST. PETERSBURG, 16/1st October, 1904.

The National Bank of Commerce, Seattle, Wash.

DEAR SIRS: In reply to your favor of the 13th. September, we beg to inform you that our Port Arthur Branch continues to work

as before, and therefore, contrary to your supposition, Bills for Collection and similar documents on that place are in Port Arthur. This is also the case with the documents referred to by you.

We may add that at the outbreak of the war, our Port Arthur Branch sent at once all bills and documents to Harbin, as the notary public had ceased his work, but when he later on
89 resumed his duties in Port Arthur, all remittances had to be returned there from Harbin.

We are doing our best to obtain information about the fate of your remittances, and as, from time to time, news leak- out from Port Arthur, we may perhaps, sooner or later, receive information about your drafts.—But, of course we cannot assume any responsibility, in the present state of politics in the Far East, as to whether and when such news may reach us.

Any affidavit by an employee of Mr. Clarkson, concerning the delivery or payment of these documents or part of them, cannot serve as proof to us. We are unable, at present, as you will understand, to examine *of* correctness of such affidavit, but may state that on another occasion, Mr. Clarkson had also insisted having certain sums to his credit with our Bank which assertion, in the end, proved to be erroneous.

We can only accept an information which comes direct from our Port Arthur Branch, and until receipt of such, we are not able to acknowledge the correctness of any affidavit or information given by third parties.

We may only repeat that, not alone to safeguard you, but also in our interests, we are doing our utmost to get some definite information from Port Arthur concerning your remittances, and shall not fail to promptly communicate to you any news which may be received by us.

We trust that this most disagreeable incident will not affect our former good relations with your valued institution,—the more so as you will certainly recognize that the same is in no way due to any fault on our part.

We remain, dear sirs,

Yours faithfully,

BANQUE RUSSO-CHINOISE.

National Bank of Commerce.

SEATTLE, WASH., Oct. 12/04.

The Manager, Russo-Chinese Bank, St. Petersburg, Russia.

DEAR SIRS: We wrote you on September 1st, and again
90 on the 13th, requesting that you return to us the bills of lading attached to the G$36,194.80 draft on Clarkson, which matured last April, or remit us the amount of same.

There has been ample time for us to receive acknowledgement of that letter and a statement as to your intentions in the premises.

These documents are obtainable, and we want them, as *as* they were removed inland before Port Arthur was completely invested.

We to-day are in receipt of the following documents which in

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themselves show that the draft has been paid to your Branch Office. You will note that in the telegram from your Vladivostok office, dated about May 19th, they state "All drafts drawn on Clarkson paid." The draft in question was in the hands of your Port Arthur Office in February and matured in April, so that it must be covered by this particular telegram. We would re*quest*fully request that you notify us immediately on receipt of this letter what you propose doing in the premises, and trust you will not, by further delay, compel us to take steps in this country to enforce our rights, which we most certainly shall do.

Very, etc.,

R. R. SPENCER.

SHANGHAI, 19th May, 1904.

Messrs. Clarkson & Co., Present.

DEAR SIRS: We beg to inform you that we have received the following telegram from our Vladivostok Branch.

"Communicate the following to Clarkson Office: to the present date, drafts Centennial Mill drawn on Clarkson Co., Port Arthur, all now paid."

Which please note.

We remain, dear sirs,

Yours faithfully,

BANQUE RUSSO CHINOISE.

(Signed) SPEELMAN.
J. BERGENDAHL.

91 U. S. Consulate General.

SHANGHAI, 30/8/1904.

I, the undersigned, Consul General of the United States of America, do hereby certify that the foregoing copy of letter dated May 19, 1904, her-to annexed and signed by Russo-Chinese Bank is a true and faithful copy of the original exhibit in this Consulate General, the same having been carefully examined by me, and compared with the said original, and found to agree therewith, word for word and figure for figure.

Given under my hand and Seal of this Consulate General, the day and year above written.

(Signed) JOHN GOODNOW,
U. S. Consul General.

The National Bank of Commerce.

SEATTLE, WASH., Oct. 17, 1904.

The Manager, Russo-Chinese Bank, St. Petersburg, Russia.

DEAR SIRS: I have yours of October 1st, and in reply would say, that the circumstances are entirely against your Institution at Port Arthur.

This draft was drawn December 11th, and should have reached Port Arthur before January 15th. It should have been, and prob-

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ably was presented for acceptance at that time, or protested for non-acceptance. Notice of protest never reached us. If accepted at that time, it matured ninety days later, or about the middle of April. Port Arthur was not invested on the land side at that time. If the draft was not paid, by all the rules of commercial usage it should have been protested and returned with all documents to this Bank. This was not done, and we leave it to your good selves to explain why.

As your bank was evidently at fault in the premises, we do not feel that because they retained bills which matured in April until July and thereby tied them up, that we should be inconvenienced to the extent we are.

The foregoing questions are clear and we would thank you very much for an explicit and prompt answer. We feel that if
92 through the fault of your Institution our documents were tied up in Port Arthur, that you should reimburse us, and look to the documents for your payment.

Very, etc.,

R. R. SPENCER.

ST. PETERSBURG, 27/9 November, 1904.

The National Bank of Commerce, Seattle, Wash.

GENTLEMEN: We have received your two favors of the 12th and 17th October and, after perusal of contents, we beg to inform you that the information given by our Vladivostok Branch to Messrs. Clarkson & Co., Shanghai, is due to a gross error of our Branch, as the same transmitted that information, on the simple demand of the interested party, Clarkson & Co. without having any proof of the payment of your remittance to Port Arthur.

Of course as the matter now stands, we are unable to discuss the question any further and therefore, hand you enclosed, in cover of the bill for:

U. S. $36,194.80 claimed by you, cheque on Messrs. Ladenburg, Thalmann & Co. New York for

U. S. $36,013.70 as per note at foot,

receipt of which kindly acknowledge.

It remains of course however understood that in case your above remittance proves not to have been paid for by Clarkson & Co. you are held responsible to refund the amount of our to-day's cheque.

We beg to add that we have no knowledge of the exact conditions established between you and our Port Arthur Branch for the collection of your documentary bills and shall therefore have to come back upon the matter in case we should learn later on that our calculation is not correct or that we should have deducted other charges.

We are unable to inform at present our Port Arthur Branch of the remittance made by us to you and request you that in case you should sooner or later receive from our Port Arthur Branch cover
93 for the same remittance, to consider the same as null and void, returning the same to us.

We remain, gentlemen,

Yours truly,

RUSSO CHINESE BANK.

$36,194.80 less

	$135.73	3/8% commission.
	45.24	1/8% transfer charges.
181.10	.13	postage.

$36,013.70

The National Bank of Commerce.

SEATTLE, WASH., Dec. 5, 1904.

The Manager, Russo-Chinese Bank, St. Petersburg, Russia:

I have your favor of November 9th, enclosing draft for G$36,-013.70, which we, of course cannot accept as full payment for the draft.

I enclose you an exact copy of the original draft sent to Port Arthur, which you will note calls for the principal sum of $36,-194.80, with 6% interest to date of return of funds in Seattle; all collection and exchange charges to be paid by drawee.

The draft to this date would amount to G$38,312.19, leaving a balance due us of G$2,298.49, which we would respectfully request that you remit us by return mail. We on our part agree upon return to us of both sets of bills, showing that the draft has not been paid, to reimburse you in the sum paid us, provided, that we were in no wise injured by the fact that your Port Arthur Branch has indefinitely held the bills after their maturity, at which time they could have been returned to us and we could have collected from the Steamship Company.

I quote from a letter just received from your Shanghai Office under date of October 3rd, as follows:

"Confirming our respects of the 16th ultimo, we beg to acknowledge receipt of your favor of the 25th of August, contents of 94 which have our best attention and in reply we beg to state that we are still unable to communicate with our Port Arthur Branch. However, a clerk from that office has recently arrived in Shanghai and he believes that all your bills on Clarkson & Co. were always treated strictly documents against payment, and that all bills against goods arrived in Port Arthur were duly paid," which appears to be an additional item of evidence that the draft was paid at maturity.

Very, etc.,

R. R. SPENCER.

A. L.
37678

16/29 December, 1904.

The National Bank of Commerce, Seattle (Wash.).

DEAR SIRS: We have duly received your letter of the 5th inst. enclosing for perusal copy of the original draft for G$36,194.80 which we return herewith.

We see therefore that all collection and exchanges are to be paid

by the drawee as well as 6% interest to date of return of funds in Seattle.

In accordance with your wishes we hand you enclosed in a cheque on Messrs. Ladenburg, Thalmann & Co. New York. $2,298.49 i. e. $2,117.39 Interest at 6% on above sum 181.10 charges as per our letter of 27/9 November. It remains understood that in case your above remittance proves not to have been paid, you declare yourselves ready to refund us these $2,298.49 with the $36,013.70 sent on 27/9 November, plus accrued interest.

We remain, Dear Sirs,

Yours faithfully,

BANQUE RUSSO-CHINOISE,
(Signed) A. ROSENFELD.
C. BERG.

1 copy of draft.

95 National Bank of Commerce.

SEATTLE, WASH., Jan. 17/1905.

The Manager, Russo Chinese Bank, St. Petersburg, Russia.

GENTLEMEN: On December 5th we wrote you relative to balance due on Clarkson draft, but so far have not received your favor in answer (it arrived to-day) thanks.

We still have in the hands of your Port Arthur Agency draft on Zozounoff and documents, or the proceeds thereof in the sum of G$270.00 a copy of which is enclosed herein.

Under the terms of this draft payment could or should have been made long before Port Arthur was closed to the outside world, but neither course has been followed, nor have we been able to hear from them on the subject.

We would request that you remit us the present value of this draft G$287.86 without further delay; also if you have not already done so, that you remit us the balance due on the Clarkson draft.

There were two drafts drawn on Zozounoff, one at a later date than that above mentioned. The goods covered by this draft were diverted by the Japanese Government, and will be settled for by the insurance company. I write this so that you may not be mislead by the statement that goods were diverted. Your prompt and favorable answer to the foregoing is expected.

Very, etc.,

R. R. SPENCER.

National Bank of Commerce.

January 18, 1905.

The Manager, Russo-Chinese Bank, St. Petersburg, Russia.

DEAR SIRS: We are just in receipt of your favor of December 29th enclosing draft for G$2,298.49 for which accept thanks.

96 We agree that guarantee contained in our letter of December 5th shall also cover this amount.

Very, etc.,

R. R. SPENCER.

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ST. PETERSBURG, 5/18 February, 1905.

The National Bank of Commerce, Seattle, Wash.

GENTLEMEN: We have duly received your letter of the 17th January.

In reply to your claims regarding Zozounoff for G$270.—, we beg to inform you that our Port Arthur Branch is closed, that all the staff have left and that all the books appertaining to the Bank have been confiscated by the Japanese. We are now taking the necessary steps to obtain our documents back and shall only be able to give you a reply when they will be returned to us.

We remain, gent'emen,

Yours, etc.,

R. C. B.

National Bank of Commerce.

SEATTLE, WASH., March 8, 1905.

The Manager, Russo-Chinese Bank, St. Petersburg.

DEAR SIR: Your favor of the 18th of February received, contents noted, and in reply would say, that they are not satisfactory.

The draft in question was mailed to your Branch at Port Arthur on the 10th day of December, 1903, was drawn at 30 d/s and consequently matured in their hands in the ordinary course on or about the 10th day of February, 1904.

They have treated us in this matter as they did in the case of the Clarkson draft, simply retaining documents or the funds, neither of which had they the right to do.

If they neglected the business, or neglected the necessary steps, they are liable ther-fore, and it is not our intention to wait the result of the war for the payment of this amount.

97 The draft provided for exchange and collection charges, and for interest at 6% from December 10th, '03 to date of return of funds here. By the time you receive this letter and make returns thereunder, the draft will be worth to us G$291.50 which amount would request that you remit us without further delay.

You will note that four months elapsed between the maturity of this draft and the investment of Port Arthur on the land side, so that there is no possible excuse for the Port Arthur Office failing to send us results in some form.

Very, etc.

R. R. SPENCER.

ST. PETERSBURG, 19/1st April, 1905.

The National Bank of Commerce, Seattle, Wash.

GENTLEMEN: We are in receipt of your letter of the 8th. March and are sending you accordingly today, under separate registered cover cheque No. 2665 on Messrs. Ladenburg Thalmann & Co., New York, for G$291.50 (Two hundred & ninety one Dollars 50 cents)

as cover on your draft for G$270.—on G. S. Zozounoff & Co. Port Arthur. Kindly acknowledge receipt of our remittance.

It remains, of course, understood, that in case your above remittance proves not to have been paid for by Messrs. G. S. Zozounoff & Co. you are held responsible to refund us the amount of our to day's cheque.

We must add that we have no knowledge of the exact conditions established between you and our Port Arthur Branch for the collection of your bills and shall therefor- have to return to the matter in the case we eventually learn that the amount of our remittance is not correct or that we should have deducted charges. As we are unable to inform our Port Arthur Branch re making you, we request you, in case you should receive sooner or later from our said Branch cover for the same remittance, to consider same as null and void, and to return it to us.

We remain, etc.

R. C. B.

98 National Bank of Commerce.

SEATTLE, WASH., Apr. 17, 1905.

The Manager, Russo Chinese Bank, St. Petersburg, Russia.

DEAR SIR: We are in receipt of your favor of 19/1 April 1905 enclosing your draft on New York for G$291.50 in payment of our bill receivable #1554 for G$270,—and interest.

Very etc.

R. R. SPENCER.

National Bank of Commerce.

SEATTLE, WASH., April 18, 1905.

The Manager, Russo-Chinese Bank, St. Petersburg, Russia.

DEAR SIRS: I am in receipt of your favor of April 1st. enclosing draft for G$291.50 and carefully note contents of your letter. The remittance you sent us is proper and right under the terms of the draft, and should any of the contingencies arise about which you write, we shall certainly do what is right in the premises.

Thanking you for your attention to this matter, I remain,

Yours, etc.

R. R. SPENCER.

ST. PETERSBURG, 14/27th June, 1906.

The National Bank of Commerce, Seattle, Wash.

GENTLEMEN: We beg to inform you that a few days ago, we have received back the books and documents of our Port Arthur Branch.

We have, of course, taken up at once, the investigation with regards to your remittances to that Branch, subject matter of much correspondence between us for the last two years, and we have seen from the following that:

Your remittance.

99 1. $375—
2. 375— } of 5/1/04 Borden's Cond. Milk Co. on G. S.

Zozounoff, Port Arthur, have been sent to our Shanghai Branch for collection, as you can see from the copy of the letter addressed to you on the 21/4th May, 1904, by our Port Arthur Branch, which we send to you enclosed.

3. $36,194.80 of 11/12/03 Centennial Mill Co. on Clarkson & Co. P. A. has been returned to you protested, by our Port Arthur branch on the 13/26 May, 1904 (as per copy of the letter enclosed).

4. $270. of 10/12/03 Armour & Co. on G. S. Zozounoff, P. A.

5. $1,100. of 31/12/03 Sprague Roller Mills on Clarkson & Co. P. A.

6. $269.60 of 31/12/03 M. J. Connell on the Officers Economical Society P. A.

7. $23,468.40 of 2/1/04 Centennial Mills Co. on Clarkson & Co. P. A. have been returned to you protested, by our Port Arthur Branch on the 7/20th June as per copy of letter enclosed.

8. $1,100. of 1/12/03 Sprague Roller Mills on Clarkson & Co. P. A. has been paid and proceeds remitted to you by our Port Arthur Branch on the 19/2nd. May, 1904.

9. $4,136. of 6/10/03 Centennial Mills Co. on Clarkson & Co. P. A.

10. $16,155.20 of 26/10/03 Centennial Mill Co. on Clarkson & Co. have been paid and proceeds remitted to you by our Port Arthur Branch on the 17/30th April, 1904.

11. $270. of 25/1/04 Armour & Co. on G. S. Zozounoff, Port Arthur. From the books of our Port Arthur Branch it appears that the First of Exchange has not been received there, but only the Second with the duplicates of Bill of Lading, Invoice and Insurance Policy which documents we hand over to our San Francisco Branch together with the other documents, mentioned further, to be returned to you after payment of our claim.

As to your remittance of

12. $283.10 of 3/2/04 Armour & Co. on Peteritz Brotl.ers,
100 Port Arthur, mentioned in your letter of the 21st April 1904, we beg to say that no trace of the same can be found in the books of our Port Arthur Branch neither can it be found amongst the documents of that Branch.

The first of Exchange for $270.—and the latter remittance may have been intercepted by the Japanese authorities or lost on the way, but no entry is to be found on the Branch's books.

As you see from the above, the bills for which we have sent you cover, viz: $36,194.80 & $270.—, by our letters to you of the 27/9th November, 16/29th December, 1904, and 19/1st April, 1905, have not been met at all, were duly protested and returned to you. The return has been effected in the usual way, by registered cover, but as the Japanese authorities have intercepted all the mail they found in the Post Office at Port Arthur at the time of surrender, it may happen that you have not received same yet.

As the case now stands, we beg you to refund us:

1. $36,113.70 plus $2,298.49 plus 6% interest on these sums from

dates of our remittances to the date of your remittance to us; this in connection with the bill for $36,194.80.

2. $291.50 plus 6% interest as stated above; this in connection with the bill for $270.—

3. Rs. 566.26 according to Port Arthur's letter of the 13th/26th May, 1904, plus 6% interest, from that date to the date of your remittance &

4. Rs. 410.04 according to Port Arthur's letter of the 7/20 June, 1904, plus interest from that date to date of your remittance.

—and request you to kindly remit the above sums to our Branch in San Francisco for account of our Port Arthur Branch.

All the duplicate documents relating to above transactions and all those "Seconds" which we have had returned by the Japanese authorities are being forwarded by us to our San Francisco Branch with instructions to hand over to you, on receipt of the above mentioned sums.

We are sending to the above Branch a copy of the present letter and remain, gentlemen,

Yours truly,

R. C. B.

101 National Bank of Commerce.

SEATTLE, WASH., July 13th, 1906.

The Manager Russo-Chinese Bank, St. Petersburg, Russia.

DEAR SIRS: I am in receipt of your favor of June 27th. But am not prepared to answer in detail in regard to same.

We should not be willing to accept the statements or books of your Port Arthur Branch, as evidence of anything having been done, as they were so notoriously lax in their business methods that it was almost impossible to keep anything straight or business like when entrusted to them.

I, however, note that the draft of Clarkson of thirty-six thousand odd was protested on the 26th of May. This was about three months after it should have been protested, or accepted. The draft was never returned to us, nor was its receipt, so far as I can now ascertain even acknowledged.

We have the statement of your Shanghai Office that this draft was paid. We also have other evidence that it was paid several days before its proper maturity.

We expect to do whatever is equitable in the Premises, but the equities must be clearly defined and proven before we feel prepared to make a refund.

As your office is fully aware, to my certain knowledge of the conditions existing there, I think you will agree with me that my position is well taken.

Yours etc.

R. R. SPENCER.

21/3, August, 1906.

National Bank of Commerce.

SEATTLE, WASH., August 4th, 1906.

The Manager Russo-Chinense Bank, St. Petersburg.

GENTLEMEN: Enclosed I hand you copy of a letter written to your San Francisco Office, having particular reference to a collec-
102 tion they claim to hold against this Bank sent them by you, and more particularly referred to in your letter of June 27th inst., and this letter is final so far as this Bank is concerned.

We trust you will be able to get the affairs of your Port Arthur Office sufficiently straightened out to reasonably account for the treatment of the draft on the Economical Ass'n of the Military and Police, no part of which transaction has ever been completed on the part of your office, although they had ample time prior to the investment of Port Arthur by land.

Respectfully, etc.

R. R. SPENCER.

SEATTLE, WASH,. August 14th, 1906.

The Manager Russo-Chinese Bank, San Francisco, Cal.

DEAR SIR: I have your favor of the 17th ultimo, also the later one referring to the same subject, under date of July 30th.

We have been investigating the subject matter of the first letter and find that your St. Petersburg office is claiming the reimbursement on two drafts; one for $36,194.80, Centennial Mill Company on Clarkson & Company, Port Arthur; one for $270.—Armour & Company on Zozounoff, also at Port Arthur.

I have examined the documents sent by you to the Puget Sound National Bank, and find that in the case of the Clarkson draft you have returned invoice, bills of lading and insurance policies, and claim to have returned the drafts upon the 26th day of May, 1904.

There are many things that are irregular and peculiar to this particular transaction. In the first place, we have a letter over Mr. Clarkson's own signature, dated May 10th, 1904, in which the following statement occurs:

"In regard to our drafts will say, that we have paid everyone of your drafts (Centennial Mill Co.) promptly; in fact the last one calling for some Roubles 74,000.—flour ex Hyades was paid some six days before it came due.

At our request the Russo Chinese Bank here telegraphed to their Branch in Port Arthur, asking for certain information on
103 various subjects (private firms at that time being unable to send telegrams) and among other things, the Port Arthur Branch notified the Bank here (at Vladivostok) that they had received the money on our account and had applied it to take up your (Centennial Mill Co.'s) draft for the 'Hyades' flour."

We have also investigated this matter through other channels, and before making a formal demand on St. Petersburg for the payment to us of the sum in question, satisfied ourselves that your Port Arthur Office had received the money for the flour but had possibly not applied it where it belonged.

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There are several things in the transaction which strike us, to say the least, as extremely peculiar.

The draft left here in December, arrived in Port Arthur in January of 1904, and should have matured, in the ordinary course of business about the middle of April of that year, at which time it should have been protested if not paid, and returned to us, with all documents, as there was no obstruction to the mails by land then existing. They do not claim, however, to have protested and returned the drafts until thirty days later, which drafts never come to hand (also a peculiar circumstance), and strangest of all, they failed to follow the usual commercial usage of returning the documents with the protested draft, an omission that can scarcely be accounted for.

Among other papers sent to the Puget Sound National Bank were all the documents pertaining to a number of drafts which were paid and remitted for by your Port Arthur Office.

This shows the irregular method of doing business. As I explained to your Mr. Allen long ago and before any claim had been made against us in regard to these two drafts, the irregularities practiced at both your Port Arthur and Vladivostok Offices were such that we would not do any further business with them, except where positively instructed by drawers of drafts, and then only under their guarantee to assume all liability of loss.

Your Port Arthur Office still has in its possession a draft for
$269.60 sent them some time in December, 1903, for which
104 they have never accounted in any way, shape or form. This
should have been protested and returned about March 1st.

Under a copy of a letter enclosed us purporting to have been written by them June 20th, 1904, they mention four drafts which they claim were protested, among them this particular one, but say they retain documents pending instructions. We cannot see why they should hold a thirty days' sight draft received by them in January (which matured the fore part of March) without protesting until June, when all means of communicating with the outside world were cut off.

Under the circumstances we cannot see our way clear to paying the claims made by your St. Petersburg office, and unless they satisfactorily account for the drafts and documents in the case last above mentioned, we shall certainly commence suit to recover the amount.

Very Respectfully, etc.

R. R. SPENCER.

National Bank of Commerce.

SEATTLE, WASH., August 20, 1902.

The Manager Russo-Chinese Bank, St. Petersburg.

DEAR SIRS:—I am in receipt of your favor of August 3rd., the contents of which have been carefully noted. I will premise what I am about to write with the statement that we are disposed to be perfectly fair in the premises, but our experience in the past with the business methods of both your Port Arthur and Vladivostok Agencies *have* been such that we will take their statements with a

very large grain of allowances where it will be to their interests to withhold any part or the whole of any transaction.

We have absolute proof that this flour was actually handled by your own officials who received the *process* therefor.

There are some statements in your letter which do not appear on the face of them to be reasonable ones. In explanation of their conduct in connection with the $36,000.—draft, you say, that the draft was protested and returned by your Branch on May 4th,
105 1904, on the same day that the besieging Japanese army closed your communication by sea and land. This is the reason given for the bills not being returned to us at that time. On May 26th, when the investment of Port Arthur had become even more stringent, they claim to have mailed the protested drafts. This does not look reasonable to us. It is also commercially the custom to advise the dishonor of drafts of that size, and even much smaller, by cable or wire. This means of communication was still open to them in May. I wired you immediately on receipt of your letter as follows: "disagree am investigating further," and now confirm. I am giving the matter the fullest investigation which from the distance involved will take some time.

I note that you say that you "can find no fault with our Port Arthur people in the given instance." It is possible that you may be satisfied with much less than would satisfy us on this side, or it is possible that you refer particularly to this instance as to being satisfied with their methods.

The writer has been authoritatively advised that some time before the opening of the war, your Port Arthur Office was investigated by an official of rather high rank, with unfortunate findings on his part.

Mr. Clarkson was not in Port Arthur at the time this flour was sold. That the flour was disposed of is not questioned and that the proceeds were paid in and handled by your bank has been authoritatively cleared. If the proceeds have been credited by your Branch on debts other than the bill then in their possession for collection, you certainly are not entitled to recover it from us.

Very sincerely yours,

R. R. SPENCER.

ST. PETERSBURG, 8/21st August, 1906.

The Manager National Bank of Commerce, Seattle, Wash.

GENTLEMEN: We have just received your telegram of 8/21st inst.

"Disagree investigating further"

and await with interest the results of your investigations,
106 which will, we are sure, prove the correctness of the Statements contained in our letter of the 3d inst., and will induce you to give the matter an early settlement.

We remain, dear sir,

Yours faithfully,

RUSSO CHINESE BANK.

ST. PETERSBURG, 7/20th September, 1906.

The Manager, The National Bank of Commerce, Seattle.

DEAR SIRS: We are in possession of your favor of the 20th ult. and abstain from discussing your unnecessary and quite useless remarks about the business methods of our Branches etc., etc.

The fact that we are returning to you the whole set of shipping documents, which were attached to the bills in question, is for itself proof enough that said bills have never been paid, and by what means "it has been authoritatively cleared" that the proceeds were paid in and "handled by our Branch" remains your secret.

In order to settle this matter one way or the other, we once more refer you to the conditions under which we transferred you the amount of the bills in question (see our letters of 27/9th Nov. and 16/29th, December 1904 and 1st April, 1905) and request you to refund the money plus accrued interest to our San Francisco Branch.

I-, on the 12/25th October, we are not in possession of a cable of our said Branch advising us your payment, we shall be obliged to take immediately the necessary legal steps to recover our money.

Yours truly,

R. C. B.

National Bank of Commerce.

SEATTLE, WASH., October 8th, 1906.

The Manager, Russo-Chinese Bank, St. Petersburg, Russia.

107 DEAR SIRS: I have your favor of September 20th contents noted with interest. I note that you say that the fact that "The whole set of shipping documents which were attached to the bills in question is for itself proof enough that said bills have never been paid." From their method of handling bills in Port Arthur, it would appear that this is not a fact and that they returned to us all of the documents on one or more bills which were paid, and paid through them. This of itself would have a tendency to disprove the conclusions you arrive at.

As to the legal actions you contemplate taking, you of course are at liberty to take such steps as best subserve your interests.

We shall shortly be in possession of all the obtainable facts in the case and will then take such action as equity seems to warrant.

Very, etc.,

R. R. SPENCER.

Jan. 24, '07.

The Manager, Russo-Chinese Bank, St. Petersburg, Russia.

DEAR SIR: Some time since we received a letter from you, stating that unless a deposit was made with your San Francisco Office of a certain amount, that you would commence suit against this Bank.

We have since been the means of sending a man to Vladivostok to investigate the conditions, and as a result of his findings, cannot feel otherwise than that we are still in the right.

Mr. Clarkson insists that he has never been able to get a statement of his account up to three months ago, and that the Bank has refused or failed to give him any satisfaction to his demands for an accounting.

We wish this matter settled, and would request that you ascertain, if you have not already done so, by direct information from Port Arthur as to what has been done, and then advise us of your intention.

108 As before advised, we stand ready to carry into effect the equities in the case, but so far as we are now able to determine, they are in our favor, and until proved otherwise, we would not care to alter present conditions.

An early answer will be greatly appreciated by,

Yours very sincerely,

M. A. K.
A. L.

31/13 February, 1907.

The Manager, National Bank of Commerce, Seattle, Wash.

DEAR SIR: We are in possession of your favor dated January 24 inst., and beg to advise you in answer that the informations your man received in Vladivostok are erroneous; we supplied Mr. Clarkson with an extract of his account from our Port Arthur books as soon as we got them back from the Japanese i. e. and of July, 1906.

As is clearly shown by our Port Arthur books and that above mentioned extract, the bill in question has never been paid by Clarkson & Co. and our previous detailed correspondence should have been proof enough to you that our Bank is quite in its right.

The whole affair is now in the hands of our San Francisco Branch with which please settle the matter direct.

We are, Dear Sirs,

Yours faithfully,

BANQUE RUSSO-CHINOISE.

The National Bank of Commerce, Seattle.

March 8th, 1907.

The Manager, Russo-Chinese Bank, St. Petersburg, Russia.

DEAR SIR: The writer will leave in about ten days for Japan and from there intends going to Vladivostok, where I will be very glad to meet your representative in conjunction with Mr.

109 Clarkson and try and get at the true inwardness of the transaction about which there seems to be so much question.

Should you desire to communication with me there, address, "c/o Kunst & Albers."

Very respectfully,

R. R. SPENCER, *V.-P.*

M A K
Commerce Seattle
coplazinha acanaceo Vladivostok
Sinorusse.

12/25 Mars 1907.

Commerce Seattle 12/25/III 07.
coplazinha Refer to your letter of 8th.
acanaceo telegraph probable date of arrival at
Vladivostok Vladivostok

SINORUSSE.

Thereupon the plaintiff read in evidence the deposition of David M. Clarkson, taken and certified before the Honorable Lester Maynard, United States Consul at Vladivostok, Siberia, and certified by him in his official capacity.

The deposition of DAVID M. CLARKSON, a witness on behalf of the plaintiff, was as follows:

My name is David M. Clarkson, age forty-eight years, residence Vladivostok. Present occupation, merchant.

During the years 1903, 1904 and 1905, I resided in Vladivostok. Was engaged in the general import, export, shipping and mining business in Russia, China and Manchuria, with various offices, and headquarters in Vladivostok.

In Shanghai I had an office doing business on its own account, but simply acting as a purchasing agent for the Vladivostok and Port Arthur offices.

In Port Arthur I was doing a general importing, shipping and contracting business.

In Vladivostok the same as in Port Arthur with the addition of mining and various industrial enterprises.

The Shanghai office was opened two years before the Russo-Japanese war and was practically closed when the war broke out. The Port Arthur Office was opened in the fall of 1898 and continued unto the outbreak of the war when it was practically closed. The Vladivostok office was opened in the spring of 1898 and still continues.

The business in Shanghai and Port Arthur was carried on under the name of Clarkson & Co., I having a partner by the name of Julius F. Lindquist, he having however, a very small and unimportant interest, simply enough to allow me to register the company as a company under the Russian law.

In Port Arthur I did a general import and export business, also a shipping business, acting as agent for various steamship lines, agent of various insurance companies and a stevedoring department. Also erected a steam brick factory and artesian well boring outfit. In connection with the shipping and stevedoring department there we had warehouses in which we carried goods for other parties as well as our own.

This business, as already stated, was carried on under the name of Clarkson & Co., and in the following way: When a steamer was

unloaded by ourselves, boat notes were given to the steamer, and the goods held at the warehouse until parties presented the bills of lading when the goods were turned over to them after all charges to date had been paid. When a steamer was unloaded by other parties but the goods were put in our warehouses, the warehouse foreman gave receipts for the goods as delivered in the warehouse and were then turned over to the owners on presentation of the bills of lading.

The business included acting as agents for the steamers plying to that port. In the latter part of 1903 and in the early part of 1904 I had the agency of the Boston Steamship Co. and the Boston Towboat Co. in Port Arthur. As far as the details of how they were handled, I only know of it in a general way, as the management was entirely in the hands of my local managers.

During 1903 I was so occupied with my business in Vladivostok that I had no time to spare to go to Port Arthur, except on very short trips and these trips were far between. Consequently, to a great extent, I left everything there to the local managers and knew little or nothing about the details.

I was the head of the firm and Mr. Lindquist had a small 111 interest.

The managers of the company at Port Arthur in 1903 were Mr. W. S. Davidson and Mr. A. T. Short. The latter was let out of the firm the latter part of 1903, and very early in 1904 Mr. Davidson was discharged. For a short while between the discharge of Mr. Davidson and the outbreak of the war I had as manager Mr. S. J. Czechowicz. At the outbreak all of my staff was ordered out of the town by General Steosell, the Commander at Port Arthur.

During 1903 and the first days of 1904 Clarkson & Co. had dealings with the Centennial Mill Co. which consisted of buying flour from the mill company. Shipments of flour were purchased.

I knew very little about the shipment of flour made by the Centennial Mill Co. on board the steamship "Hyades" about December 10th. I simply knew that the shipment had been made, but of the quantity I had no exact knowledge. Nor do I know the date of the arrival of the "Hyades" at Port Arthur.

All shipments of flour from the Centennial Mill Co. to Clarkson & Co. were straight sales, not on consignment, with the exception of one or two small and unimportant shipments.

I cannot state definitely what was done with the "Hyades" flour on its arrival in Port Arthur, as all the books, and documents pertaining to the Port Arthur office were lost during the siege of Port Arthur and as I was not posted as to the details of the running of the office in the latter part of 1903 and beginning of 1904. But I suppose that any shipment that arrived before the outbreak of the war was handled in the same way as previous shipments. To the best of my knowledge and belief the "Hyades" shipment would have been unloaded same as previous shipments that is, either stored in our warehouse or on the foreshore. I cannot tell how the unloading came about as I have no details.

I cannot state what became of the "Hyades" flour but suppose it was added to the other stock of flour that we had on hand as we always carried a very large stock.

I do not know what became of the flour or whether the flour was sold or not.

I do not know what the particular agreement was as to the time of payment for the "Hyades" flour, but the general arrange-
112 ment was for a three months' draft attached to bills of lading, delivery of documents against payment.

Interrogatory 27. Where Clarkson & Co. were the consignees of Centennial flour, and it was discharged by the ship into the "go-down" or warehouse of Clarkson & Co. at Port Arthur, and the method of payment was by draft of the Centennial Mill Co. upon Clarkson & Co. at Port Arthur, *will* bill of lading attached, payable at thirty sixty or ninety days after acceptances, was there any custom or practice at Port Arthur that the Bank or person holding the draft after acceptance and until the time of payment had or retained any control over the flour in the "go-down" or warehouse, and if so, what was the custom?

Answer. Our custom was that the goods should be turned over only on presentation of the documents, but in this connection will say that goods were often given out by other shipping agents against a letter of guarantee of the receiver of the goods, that he should present the bill of lading later on, the excuse being generally that the consignee had not received the documents. While this was often done by other people I strongly objected and many times told my managers to not deliver the goods without the bill of lading. To be sure that there would be no mistake I wrote them a letter from Vladivostok which I herewith submit in evidence. Press copy-book, page 598, dated Vladivostok July 18/31, 1903, general number 12016, Letter No. 878. Messrs. Clarkson & Company, Port Arthur. Dear Sirs: "The writer met one of the smaller class of merchants of Port Arthur a few days ago, and he happened to mention that he had obtained a small shipment of goods from you on his personal letter of guarantee, the B/L not having arrived at the same time as the goods. We want to once more call your attention to the writer's unwillingness to assume the responsibility that results from giving up goods without the Bs/L, or a guarantee backed by the Bank. The last time Mr. Clarkson was in Port Arthur he spoke to you about this matter, and your reply was that it was not always possible to refuse such a request without it causing unpleasantness and loss of business, but will say we would rather lose business than run such risks. Mr. Davidson and Mr. Short both mentioned
113 the fact that as Kunst & Albers gave them goods on the firm's letters of guarantee without the Bank's endorsement, they considered they must do the same when asked by Kunst & Albers. We would much prefer that you make it a point to get your guarantees endorsed by the Bank, and then you can ask Kunst & Albers to do the same. You cannot be too careful in this matter, and in the case of our own goods coming on steamers addressed to ourselves, don't touch the goods without some arrangement having

been made with the Bank in regard to the documents. As the writer went into this so fully in person, we would not have referred to the matter again if he had not met the Port Arthur merchant. We will ask you to follow our wishes in this matter to the letter. We are, Dear Sirs, Yours faithfully, (signed) Clarkson & Co." I also submit a certificate from the American Consul, marked Exhibit "A" that this letter appears on pages numbered 598 and 599 in my press copy-book of letters sent to the Port Arthur Office.

Clarkson & Co. always either paid the drafts before taking delivery of the flour as merchants or else made arrangements with the bank by which the bank would turn over the documents to us.

As to this particular shipment, I do not know, but suppose it was handled as former shipments.

I do not know anything about the draft of the Centennial Mill Co. upon Clarkson & Co. about December 11th, 1903, as I was not in Port Arthur and the details were not sent to me.

I do not know whether such a draft was presented or before whom, or whether it was accepted or not.

All my books, documents and records belonging to Port Arthur were lost during the siege, with the exception of a few unimportant ones, which do not in any way refer to the shipment.

I do not know whether any part of the proceeds of the sale of "Hyades" flour was devoted to the payment of the said draft.

I believe that a certain amount of the whole stock was sold a day or two before the war broke out. Any such proceeds must have been deposited in the Russo-Chinese Bank, as there was no other
114 place for the money to be put. Whether it was applied on the draft or not, of course, I cannot tell. Having no records I do not know whether the draft was paid or not. But from indirect information which I received during the first month or two after the war broke out, I supposed at that time that the draft had been paid.

At various times in 1904 and 1905, I stated to persons interested that said draft had been paid at maturity, or words to that effect, based on the information I had received during the first two months after the outbreak of the war.

Interrogatory 43. Did you intend to deceive any person by such statements, if you made any?

Answer. I certainly had no intention to deceive anybody, and herewith is a copy of a telegram sent to Mr. Epstein in St. Petersburg. Mr. Epstein at that time was the head manager of the Vladivostok branch of the Russo-Chinese Bank, and had gone on to St. Petersburg to consult with the board of the Russo-Chinese Bank. At the outbreak of the war, when my people were driven out of Port Arthur, no private people of firms were allowed to send telegrams to Port Arthur, so I asked the managers of the Russo-Chinese Bank in Vladivostok to send certain telegrams for me through their office in Port Arthur. When Mr. Czechowicz was driven out of Port Arthur, he was here for a few days, and I asked him if there were any unpaid drafts in Port Arthur, and he told me that there were none, all having been paid up to date. Indirectly I heard that some

goods, among which was a certain amount of flour, had been sold by my former manager, Mr. Davidson, to M. Ginsburg & Company. At the time this sale was made Mr. Davidson was no longer in my employ, having been discharged some days previously. He, however, took advantage of the confusion in Port Arthur to make this sale. Thinking that there was a certain amount of money that would be to my credit in the Port Arthur branch of the Russo-Chinese Bank, I asked the managers to telegraph to their managers in Port Arthur to remit any balance to my credit to the bank here. The reply from the Port Arthur bank was that they were holding money of mine to pay certain drafts that were about due. At my request the bank here once more telegraphed to the Port Arthur bank and
115 told them to send forward all drafts that they might hold against Clarkson & Company to the Bank here, and also any money that Clarkson & Company had on deposit; the idea being to pay up these drafts in Vladivostok, as at that time my office in Port Arthur was completely deserted. After a few days the reply came back saying that the money that I had on deposit had been used in paying up a draft from the Centennial Mill Company. For future evidence I wanted to get copies of all these telegrams but I could never get them from the bank. As Mr. Czechowicz had told me that all drafts up to date had been paid, and had mentioned that there was one draft that was about due from the Centennial Mill Company, and as the Port Arthur bank had held back money of mine against the payment of such draft, I naturally took it for granted that any draft from the Centennial Mill Company had been paid up. I tried to get full particulars from Mr. Czechowicz, but he was so badly frightened that he had only an indistinct idea of what really had happened in Port Arthur and could give me no such details as I required. He was here but a few days, and then left for America.

The translation of the telegram referred to in the beginning of this answer is as follows:

"St. Petersburg, Sergei-efskaia 38, Stephan Lwovitch Epstein. I confirm that telegram of Vladivostok Branch to Shanghai Branch was sent at my request, but still think that Port Arthur branch kept back money to pay the draft let St. Petersburg send Port Arthur account so that I can make out how the business actually stands Clarkson, October 27th, 1906."

I am unable, up to the present time, to say whether I was mistaken in my statement that the draft had been paid, or not.

Interrogatory 47. State if you knew what were the political conditions at and in the neighborhood of Port Arthur during the year 1904, both on the land and on the sea.

Answer. During the year 1904 war was going on between Russia and Japan, and the Japanese fleet in front of Port Arthur kept the Russian fleet hemmed in the harbour, and on land the Japanese army had Port Arthur shut in and besieged, as a result of
116 which no communication could be had with Port Arthur whatever for private parties. All Americans and Englishmen were driven out of Port Arthur at the beginning of hostilities, and the only communication with the outside world was by occasional

dispatches that the Russian Government managed to get through the lines with torpedo boats. This means of communication of course was of absolutely no benefit to merchants, and as a result I know practically nothing of what was going on.

The war put a full stop to all outside communication with the world either telegraphic or by post with the exception of an occasional Russian torpedo boat that managed to run the blockade and deliver despatches to Chefoo. All mail communication was cut off between Port Arthur and the outside world after the taking of Dalny by the Japanese and stayed cut off until the end of the war.

Port Arthur was besieged by the Japanese and captured by them in the latter part of the year 1904 and the beginning of 1905.

To the best of my knowledge and belief Clarkson & Co. owed nothing to the Russo-Chinese Bank at Port Arthur during the months of April and May, 1904.

Mr. Ofsiankin was the manager of the Port Arthur Branch of the Russo-Chinese Bank in April and May, 1904.

To the best of my knowledge, Clarkson & Co. did not give any instructions written or oral to the Russo-Chinese Bank at Port Arthur or to its managers or either of them, to pay any sum on account of the Centennial Mill Company's draft on Clarkson & Co. for $36,-194.80 for the "Hyades" flour.

Cross-examination:

At this time the firm of Clarkson & Co. is indebted to the Russo-Chinese Bank for the sum of 231,000 roubles.

The company never owed the Shanghai Branch of the Russo-Chinese Bank any money whatever.

The amount that was owing to the Port Arthur Branch was a matter of dispute after the war. Clarkson & Co. claimed that they owed nothing and that the total debt of Clarkson & Co. was owed by them to the Vladivostok Branch. The amount that was
117 owing was a matter of dispute for almost two years, commencing in October, 1906. Clarkson & Co. claimed the bank owed them over a half million roubles and the bank claimed that Clarkson & Co. owed them over 900,000 roubles. It was finally settled in May, 1908, by a compromise by Clarkson & Co. acknowledging a debt of 231,000 roubles.

I know the firm of Ginsburg & Co. of Port Arthur and vicinity.

Early in the year of 1904 Ginsburg & Co. obtained possession of a certain amount of flour from Clarkson & Co. at Port Arthur, but whether it was the "Hyades" flour or not I do not know. They bought the flour from Mr. Davidson after his dismissal by me. They purchased it from Mr. Davidson as the supposed representative of Clarkson & Co. It was not Clarkson & Co. who made the sale.

Cross-interrogatory No. 22. Was the sale made to Ginsburg & Company by W. S. Davidson, acting for Clarkson & Company? If so, state what was the purchase price of the flour? Did it not amount to the sum of about 67,000 roubles; and did not you complain to the Russo-Chinese Bank at Port Arthur that Davidson had agreed

to sell the flour to Ginsburg & Company for less than it was worth by at least one rouble per sack?

Answer. The sale was made by W. S. Davidson, but after his dismissal from Clarkson & Company.

W. S. Davidson was not acting for Clarkson & Company when he sold the flour to Ginsburg & Company. The flour was sold at two different prices, one bill was made out at Rbls. 2.00 a sack, and one bill was made out at Rbls. 2.40 a sack. The exact amount of flour sold by W. S. Davidson to Ginsburg & Company I do not know, nor do I know the amount that it brought.

On account of the inability of Vladivostok merchants to send and receive telegrams from Port Arthur, I only heard of certain transactions some little time after they had happened. This information being derived through the aid given me by the Russo-Chinese Bank in Vladivostok, who were allowed to send telegrams to and from Port Arthur strictly on the bank's business. The first I heard was
118 that the flour had been sold at Two roubles a sack. I firmly believe at that time, that as war had broken out, the flour that was in Port Arthur at the time was worth fully Rbls. 3.00 a sack, consequently I considered that any sale made at Rbls. 2. was at least One rouble below the market value. To the best of my knowledge and belief the selling price before hostilities commenced was from Rbls. 2.50 to Rbls. 2.60 a sack. It was only sometime afterwards that I heard that W. S. Davidson had made out the two sets of bills to Ginsburg & Company, and that the difference between Rbls. 2.00 and Rbls. 2.40 a sack had been turned over to him by Ginsburg & Company. He received some cash and the balance by a draft on Shanghai. I heard of this draft on Shanghai, and the Russo-Chinese Bank of Vladivostok instructed the bank in Port Arthur to wire to Shanghai and stop the payment of it. This they succeeded in doing, and Ginsburg & Company paid the amount of the draft into the Russo-Chinese Bank at Port Arthur.

Cross-interrogatory No. 23. Did not the Russo-Chinese Bank, acting under your instructions, refuse to permit Ginsburg & Company to take the flour at the price agreed upon between Ginsburg and Davidson, and did not Ginsburg agree with the bank to pay an additional sum for the flour in order to get it?

Answer. Acting under instructions from me, the bank in Port Arthur refused to let Ginsburg & Company have the flour at Rbls. 2.00, whereupon Ginsburg & Company agreed to pay Rbls. 2.40.

We gave no instructions regarding the sale of flour to Ginsburg & Company direct to the Russo-Chinese Bank in Port Arthur because we could not communicate with them. All instructions were given to the bank at Vladivostok with a request to forward. Almost all these requests on our part were verbal.

Deposition of Anatoly Vladimirovich Vinberg, for Plaintiff.

Thereupon the plaintiff read in evidence the deposition of Anatoly Vladimirovich Vinberg, taken and certified before the Honorable

James W. Ragsdale, United States Consul at St. Petersburg, Russia, and certified by him in his official capacity.

119 The deposition of ANATOLY VLADIMIROVICH VINBERG, a witness on behalf of the plaintiff, was as follows:

My name is Anatoly Vladimirovich Vinberg. I am sworn attorney at law, of the St. Petersburg District Court, residing at St. Petersburg. Am 37 years old. I have been practicing as attorney at law for eleven years, during which I have carried on legal civil suits in the courts of the Empire.

In 1904 there was in force the "statute on bills of exchange" sanctioned by his Imperial Majesty on May 27, 1902, published in No. 62 of the laws and orders of the Government (Sec. 622). The statute on bills of exchange, after having been examined by the State Council and sanctioned by His Imperial Majesty, was put in force throughout the country since January 1st, 1903.

The statute on bills of exchange was in force throughout the Quantoon Region and particularly in Port Arthur.

I append hereto an official copy on the statute of bills of exchange in the Russian language. Owing to the lack of sufficient knowledge of the English language, I am unable to present a translation of the same which would be exact for the American Court to pronounce a judgment in virtue thereof.

Testimony of S. T. Steparnov, for Plaintiff.

S. T. STEPARNOV was called and sworn as a witness on behalf of the plaintiff as a translator and testified as follows:

I am familiar with the Russian and English language.

Turning to subdivision 41 of the pamphlet attached to the deposition of A. V. Vinberg entitled "A copy of the Laws of the Russian Empire, Volume 11, Part second, Statute on Bills of Exchange for Commercial purposes" and read and translated paragraph 41, subdivision 41, as follows:

"A bill of exchange due at a certain date, or at such a time from the date of it, or at such a time from presentation is to be presented for payment at the due date or at one of the following two days if not holiday or Sundays."

Deposition of Charles Richter on Behalf of Plaintiff.

Thereupon the plaintiff read in evidence the deposition of Charles Richter, taken and certified before the Honorable Lester
120 Maynard, United States Consul at Vladivostok, Siberia, and certified by him in his official capacity.

The deposition of CHARLES RICHTER, a witness on behalf of the plaintiff, was as follows:

My name is Charles Richter, I am thirty-five years of age, reside

at present in Harbin. I am director of the Russo-Chinese Bank at Harbin.

From January 1st, 1904, until the end of 1904, I resided at Port Arthur. From January 1st until April 14th, submanager of Kunst & Albers, Port Arthur; from April 14 to August 2d, Manager of Kondakoff & Souvoroff. And from August 2d was attorney of the Russo-Chinese Bank at Port Arthur.

I was one of the three managers. I had to keep one of the books, the register of accepted checks issued by the bank. I had to look over the books on several occasions and also to make entries. The bank kept books in order and entries were made in the daily journal involving the collection of drafts and all moneys collected for third parties were entered in the cash-book.

At the capture of Port Arthur the books, papers and effects of the Russo-Chinese Bank were all arrested by the Japanese and were retained by them until about April, 1906. While the books, papers and effects were in the possession of the Japanese military forces, the bank had no access to them. They are now at the head office of the bank.

There was a law in Port Arthur in 1904 to allow two days of grace on bills of exchange.

Interrogatory 33. State any other matter or thing within your knowledge material to the action of the plaintiff herein against the defendant herein, as fully as though you had been particularly interrogated -hereon.

Answer. As far as I know Clarkson is stating to have paid the draft for $36,194.80, but I know for a fact that such draft has not been paid by Clarkson; that it was protested, and the bill and protest sent to the National Bank of Commerce of Seattle, but has gone astray in consequence of the war.

121 Cross-examination:

I am still employed by the Russo-Chinese Bank.

The books of the late Port Arthur bank are now at the office of the bank at St. Petersburg. They are not at Vladivostok at present. I have no access to them, and they are not under my control.

The correspondence between Clarkson & Co. or Clarkson and the Port Arthur branch is now in the head office of the bank at St. Petersburg. It is not in my possession or under my control. I have some uncertified extracts of it.

During 1903 and part of 1904 managers were: A. W. Ovsiankin, now manager of the Vladivostok branch of the Russo-Chinese Bank, and A. E. Dmitrieff-Mamonoff, who left the services of the bank in 1905 and whose present residence is unknown to me, and officers were Mr. Alexander Friedberg, now in St. Petersburg at the head office of the bank, and Mr. S. A. Pavloff, now at the bank's services in Vladivostok. Messrs. Ovsiankin, Friedberg and Pavloff left Port Arthur on the 20th July—2d August, 1904, during the siege. Mr. Mamonoff remained in Port Arthur and I was transferred on the said date from Suvoroff & Kondakoff's office to the bank as submanager.

From 1st of December, 1903, until 20th July/2d August, 1904, the officers in charge were Messrs. Ovsiankin, Friedberg and Pavloff and partly Mr. Dmitrieff-Mamonoff, whose arrival was unexpected a few days prior to Port Arthur being cut off by the Japanese; it was his intention to return to Moukden, where he was in charge of the Russo-Chinese Bank, but that was impossible. From the 20th July/2d August, to the closing of the Port Arthur branch the business was carried on by Mr. Mamonoff and myself.

I was not familiar with the go-downs of Clarkson & Co. at Port Arthur. I was there once or twice, it must have been in the beginning of 1904 prior to my entering the bank's service. When visiting the go-downs I saw a lot of flour, but I could not state the quantities.

Hostilities between Russia and Japan commenced on the 26th January/8th February, 1904, and Port Arthur was captured on the 20th of December, 1904/2d January, 1905.

122 Mr. Gregory: These are all the depositions that we have.

May it please the court, it may be stipulated between the parties that the steamship "Hyades" arrived at Port Arthur on January 16, 1904, and that she left Port Arthur for her homeward voyage on January 22nd, 1904.

It may be also stipulated that the log book of the steamship "Pleiades" will show that she arrived at Port Arthur on February 7, 1904, and that she left Port Arthur for her homeward voyage on February 13, 1904.

R. R. SPENCER, a witness produced by the plaintiff to maintain the issues on its behalf, being sworn, testified as follows:

In the years 1903-4-5 and '6 I was cashier and vice-president of the defendant bank, National Bank of Commerce, of Seattle, and as such had charge of the correspondence with the Russo-Chinese Bank of Port Arthur. I recall the fact that a draft of the Centennial Mill Company for Thirty-six thousand odd dollars, dated December 11, 1903, drawn on Clarkson & Co., was brought to the bank. Previous to that time the bank had had a number of transactions between the Central Mill Company and Clarkson & Co. These transactions dated back to 1906 or '8. In the meantime we had dealt with the Russo-Chinese Bank. I recognize the letter dated January 9/22, 1904, plaintiff's trial Number one. It was received by us about February 25, 1904. That letter was in the usual form in which we had been accustomed to receive acknowledgment of drafts by the Russo-Chinese Bank. The paper referred to was received in evidence as plaintiff's Exhibit "A," and read (Post p. 149).

Plaintiff's Trial 1.

Case No. 1517.

PLAINTIFF'S EXHIBIT A.

United States District Court, Western Dist. of Washington.

—— ——

vs.

THE NATIONAL BANK OF COMMERCE.

Filed —— —, 19—.

Filed.

123 U. S. District Court, Western District of Washington, Feb. 27, 1912.

A. W. ENGLE, *Clerk*,
By —— ——, *Deputy*.

PORT ARTHUR, 9/22 January, 1904.

1833
Russo-Chinese Bank
Codes used:—
ABC 4th ed.
ABC 5th ed.
A1 1898
Lieder's 1898
Western Union 1901

Seattle, Wash.

Telegraphic Address: "Sinorusse".

DEAR SIRS: We beg to acknowledge receipt of your fav—11/XII-03—as well as of advised bill & documents for

(2) G $37294.80.....on.....P'Arthur .....
.....on.....
.....on.....

sent us for collection Feb. 25, 1904.

[On left margin:] 559/8 (7035/6)

Please note:

1. That, unless otherwise instructed, bills of any description sent us for procuring acceptance &/or for collection will be protested both for non-acceptance or non-payment and immediately returned to the sender.

2. When sending us for collection documentary bills or only documents, clearly state in your letter accompanying same whether in case of dishonor:—

(*a*) both bill and documents are to be promptly returned with the relative deed of protest, or

(*b*) if the bills is to be returned & the relative documents are to be kept here at your disposal or

(*c*) if the goods are to be stored by us and fire insurance is to be covered pending receipt of your instructions.

3. Our Bank does not guarantee that the goods be stored in due time when there is no storage accommodation obtainable, and
124 takes no responsibility whatever if same are not landed in perfect condition, nor if the goods are deteriorating or becoming of lower value in consequence of price fluctuations while under our Bank's control.

Yours faithfully,

RUSSO-CHINESE BANK
(Port Arthur Branch).
W. S. DAVIDSON.

In connection with the shipment by the "Hyades" our instructions were the usual printed ones for collection and return in New York funds, and that the documents were to be delivered only on payment. Those were the only instructions so far as I recollect. We did not give any instructions to insure or store this flour so far as I know. After some time we became involved in quite a correspondence with the Russo-Chinese Bank concerning respective rights of the two banks. In our letters we stated to them that we had knowledge of the fact that the draft was paid at the Port Arhur Bank and urged them to pay the money. The statement in our letter of July 13, 1906, that the receipt of the draft was never acknowledged I now find was a mistake. It probably was not called to my attention. We have searched the records of the bank and cannot find that the draft had been returned to us. If it had been returned it would have been immediately placed on my desk for my personal attention. I am certain that the draft never reached Seattle. Our bank paid the Centennial Mill Company the face of the draft without discount. The Mill Company subsequently paid the money back to us November 2, 1904. That was before the Russo-Chinese Bank had paid us. We had a guaranty from the Centennial Mill Company to protect us against that draft. Independent of the draft I had a verbal understanding with the president of the Centennial Mill Company that if we continued to send drafts to the Russo-Chinese Bank that it must be done at their request, and that they must stand for all liabilities, all risks, that were incurred by so doing. This was from Mr. Thomsen, president of the Mill Company, and was made before the shipment on the "Hyades," with the understanding that they
125 were to take every risk and responsibility so far as the handling of the drafts were concerned. On receipt of money from the Russo-Chinese Bank we paid it over at once to the Mill Company. The payment by the Russo-Chinese Bank included the face of the draft and interest on same from the time the flour left Seattle. We never paid the Russo-Chinese Bank anything in connection with its services for this transaction. The Centennial Mill

Company has received its money for the flour and our bank has received the money paid for the draft.

And upon Cross-Examination, he said:

The general guaranty of the Centennial Mill Company was not in writing. The president of the company stated to me verbally that if judgment should be rendered against us in this case his company would pay it. The Centennial Mill Company re-paid us, principal and interest, November 2, 1904. After that time in further negotiations with the Russo-Chinese Bank, we were representing the Centennial Mill Company. We never received the letter of May 26, 1904, alleged to have contained the draft.

"Q. Now, Mr. Spencer, counsel has directed your attention to the letter of January 9/22, 1904, addressed by the Russo-Chinese Bank to the National Bank of Commerce, in which there are certain printed sections beneath the letter or in the letter, in which it is stated that "Unless otherwise instructed, bills of any description sent to us for procuring acceptance or for collection will be protested both for non-acceptance or non-payment and immediately returned to the sender." Regardless of that provision which I have just read to you, I will ask you what the custom is among bankers, and what is the commercial usage among bankers, with regard to the return of the documents when drafts are protested, or otherwise?

Mr. Gregory: We object to that question upon the ground that there is no room here or no occasion for the introduction of any usage or custom. The transaction in this case was a definite contract, formed by the letters which said that the documents should be delivered as against the payment. There is no doubt or ambiguity concerning the matter, and, therefore, custom or usage is not admissible. I invoke the rule that you never can support
126 a contract by custom or usage unless the contract is ambiguous or needs to be supplemented by additional testimony.

(Argument.)

The Court: Overrule the objection.

Mr. Gregory: Note an exception.

The Court: Exception allowed."

A. They are supposed to protest the draft for non-acceptance and non-payment and it is customary where large amounts are involved, to cable the fact that the draft has been protested for non-acceptance or non-payment. No cablegram was sent to us regarding that matter from Port Arthur.

Q. I want to call your attention to the second subdivision of the printed matter contained on the letter to which I have just referred, which reads as follows: "When sending us for collection documentary bills or only documents, clearly state in your letter accompanying same whether in case of dishonor:—(*a*) both bill and documents are to be promptly returned with the relative deed a- protest, or (*b*) if the bill is to be returned and the relative documents are to be kept here at your disposal or (*c*) if the goods are to be stored by

us and fire insurance is to be covered pending receipt of your instructions.

I will ask you, Mr. Spencer, to state what the commercial usage among bankers, is, between the forwarding bank and the collecting bank, as to the duty or custom of the collecting bank to return the documents upon the dishonor of the draft, either for non-payment or for non-acceptance, and the documents accompanying them.

Mr. Gregory: We object to this question also upon the ground that this is not a proper subject for custom, and upon the further ground that the contract specifically and directly provides as to what is to be done.

The Court: I take it that you mean by "custom" the course of business.

Mr. McCord: That is all.

The Court: And I think it is proper to explain to the jury the course of business as bankers understand it.

Mr. McCord: That is exactly what I am trying to do.

The Court: Overrule the objection.

Mr. Gregory: Note an exception.

127 A. They will hold all documents until they receive an answer. It is ordinarily customary for them to hold the draft and documents until they can receive advice, especially the bills of lading, in order that they may be able to take action in regard to the goods. I am speaking now in any event that they cable us we would give them specific instructions as to what to do. The reason those instructions are not included in our letter is from the fact that we never know what contingency may arise, consequently we leave it to their judgment to take such steps in the event of any contingency as they would take to protect their own property, by advising us.

Mr. Gregory: We ask that that portion of the answer commencing with "the reason" to the end go out as not responsive to the question and as incompetent, irrelevant and immaterial.

The Court: The motion to strike is denied.

Mr. Gregory: Exception.

The Court: Exception allowed.

(Mr. McCord:)

Q. In the absence of instructions, what is the commercial usage in regard to the return of the documents? Suppose there is no telegraphic communication, they don't advise of the fact of the dishonor, the forwarding bank knows nothing about it, what is the duty of the bank upon the dishonor of the paper, and what is the custom in regard to the return of the draft and the documents?

Mr. Gregory: We note the same objection, Your Honor, as heretofore made.

The Court: Objection overruled.

Mr. Gregory: Exception.

The Court: Exception allowed.

(Mr. McCord:)

Q. What is it?

A. The custom would be to return the draft—protest and return the draft, either for non-acceptance or payment, as the case might be.

Q. What would become of the documents?

A. The documents would be held and probably used in the matter of storing the goods.. They would be compelled,—should they store the goods and take such steps as might be necessary to protect
128 our interest, the documents might have to be delivered to the steamship company or used in the storage of the goods. The draft would be protested and returned and should be protested and returned promptly.

Q. What is the custom, in case of the dishonor of a draft or non-payment, of the collecting bank, in the absence of instructions, in regard to storing and protecting the goods?

Mr. Gregory: We object to that as incompetent, irrelevant and immaterial, calling for a conclusion of law. The courts have very clearly defined what the powers and duties of collecting banks are.

Mr. McCord: I am not asking what the law is, I am asking what the banks usually do, in commercial usage?

Mr. Gregory: I submit it is not a question of usage.

The Court: Overrule the objection.

Mr. Gregory: Note an exception.

The Court: Exception allowed.

A. They are expected to use diligence in taking such steps in regard to storage, insurance and so forth as they would take were the property their own and under their own immediate—and in their own immediate possession.

Mr. Gregory: We ask that the answer be stricken out as not responsive, as not stating what the custom is; it not having been stated over what extent of territory it goes, or whether it would apply in this particular instance.

The Court: Motion to strike is denied.

Mr. Gregory: Note an exception.

(Mr. McCord:)

Q. As I take it, then, Mr. Spencer, these requirements or these suggestions that the Russo-Chinese Bank made to you as to what you should tell them when you sent the draft, what to do with it in case of dishonor, as I understand you the commercial usage would control that regardless of whether you told them to do so or not?

A. Yes sir.

Mr. Gregory: Objected to as calling for a conclusion of law, the witness substituting his opinion for what the law says.

The Court: I think the question is objectionable as a leading question.

129 Mr. McCord: I am cross-examining their witness, he is not my witness.

The Court: Well, that is so. I overrule the objection.
Mr. Gregory: Note an exception.

Redirect cross-examination:

The draft should be returned by the collecting bank and generally is, unless there is some such reason as the following: The payer promises within ten days to take it up, in which case it would be foolish upon the part of the collecting bank to return it, but if there is no prospective payment by the drawee of the draft it should be returned, and bills of lading as well, unless they are required, or are essential to the proper care and handling of the goods by the collecting bank. There is temporarily a reason why the collecting bank should retain the bills of lading which does not apply to the draft. I knew the firm of Clarkson & Co. of Port Arthur. Did not know that they were agent of the steamboat line. Never knew it until it developed later; probably at the previous trial of this case. Cannot say whether Mr. Ostrander sent letter from Shanghai — which he said that the reason that this flour had been gotten away was that Clarkson was also the agent of the steamboat line. Cannot state. May have seen letter of that kind. It is some eight years ago. I knew of certain documents involved in this case being at the Puget Sound National Bank. I saw them about August, 1906. Found all the documents there except the draft.

The Court:

Q. In the case of flour, Mr. Spencer, sent to a foreign country, with a draft, 30-day draft or a time draft payable at sight, attached to a bill of lading, what is the course of business as between banks with regard to the custody of the flour during the time intervening from the presentation and acceptance of the draft, if it should be accepted, and the date when the payment on the draft would be due?

Mr. Gregory: Your Honor, I dislike very much to make an objection, but to be consistent I shall have to do so.
The Court: Yes, I will allow you an exception. I think this ought to be explained.
130 Mr. Gregory: I simply wanted to maintain my record on that.
The Court: You have your exception.

A. The goods are supposed, or are, or at least should be stored in an independent warehouse, that is, a warehouse that is free from the interference of the consignee of the goods. Ordinarily the policies of insurance follow the draft, so that the bank has knowledge that the goods are insured. If the goods are deliverable upon acceptance and the party accepts the draft, of course he takes the bills of lading and the sending bank or the drawer assumes all liability from then on. If the drafts are payable—if the draft is drawn "Delivery of documents on payment only" then it is the duty of the bank, so far as it can exercise it by reasonable diligence, to hold possession indirectly, by warehousemen, of those goods, until it delivers the bill

of lading or the warehouse receipts which are substituted for the bill of lading.

Recross-examination.

Among documents returned to the Puget Sound National Bank in 1906 were bills of lading of either two or three drafts, which should have been delivered to the consignee upon the payment of the draft, but they evidently had not done so and returned them, for what reason I could not tell. They were shipments with drafts on Clarkson & Co. The drafts had been paid, but the documents were returned. The documents with the Puget Sound National Bank were offered to us on condition that we repay the amount received by us with interest. There was no unconditional offer.

Redirect examination:

I cannot say whether the bills of lading just spoken of referred to two drafts for $4136.00 and $16,155.20 or not. I think those were the bills of lading. I as a banking man understand that when a bank recives a draft for collection, with the bill of lading attached, and there is no instructions of any kind given excepting that the documents shall be withheld until payment, the collecting bank in such a case assumes responsibility for the goods. They as-
131 sume the responsibility of giving the merchandising company the same care that prudence on their own part in protecting their own goods would dictate. They assume—when the steamer comes in—and cannot assume otherwise, that the goods go from that steamer into the warehouse. The bills are presented to the drawees. If they accept and are responsible the bank can naturally assume that no further attention is necessary on its part, excepting to hold the bills of lading and nominal possession of the goods until the draft is paid, unless it is directed to deliver when the draft is accepted, and the drawee is, in the opinion of the bank, responsible. Its responsibility so far as looking after the goods is over. The bank is usually supposed to use the same judgment that it exercises in the preservation of its own funds. I meant that the goods should be stored in an independent warehouse. In this case I meant that the Russo-Chinese Bank was responsible because Clarkson & Co. were the agents of the steamboat company, and also the parties who were buying the flour. Supposing that the bank at Port Arthur did not know that Clarkson was the agent of the steamboat line, I should say that under those circumstances, if it had presented the draft on its arrival, procured acceptance, transacted the business in the usual way, had no knowledge or suspicion from the fact that Clarkson & Co. was the agent of the steamship company, they could not be expected to go down and watch the unloading of the boat.

Witness recalled for recross-examination.

(Mr. McCord:)

Q. Mr. Spencer, referring to the question that was asked you last night by Mr. Gregory, for the plaintiff, I think he asked you if a draft drawn as this one had been drawn, with documents attached, that after the acceptance of the draft, pending the pay date of the draft, if the goods were housed in an independent warehouse, you would not consider it the custom of bankers to look after that shipment; is that correct?

Mr. Stiles: If Your Honor please, I object to this as not cross-examination.

Mr. McCord: Counsel brought it out, Your Honor.

Mr. Stiles: Only after counsel's insistence had brought
132 out other matters. We asked this witness just three things, which I called Your Honor's attention to yesterday.

The Court: This question, as far as it has been stated, is almost a repetition of one of counsel's that was asked last night by your side. I don't know what else is coming, what else there is to it. State your question and let me hear it.

(Question read.)

A. I answer no to that question.

(Mr. McCord:)

Q. Now, counsel also asked you if there was nothing to excite the suspicion of the bank as to the fact if the goods being in the possession of the consignee or being disposed of, would it be the custom of the bank to look after the shipment. I think you answered that question no. I will now ask you, if there was anything to excite the suspicion of the collecting bank as to whether the goods were in the hands of the consignee wrongfully or were being sold by him, what would be the custom of the bank, if they had this suspicion or did have this knowledge of the fact that the goods were in the hands of the consignee contrary to the instructions of the bank or that the goods were being sold by the consignee before the payment of the draft?

Mr. Gregory: We object to the question, first, upon the ground that it is not proper cross-examination, and, secondly, that it assumes a state of facts which are not proven to have existed—that there was any reason for suspicion on the part of the bank at Port Arthur. There is no testimony on the point at all.

Mr. McCord: That is the question counsel brought right home, Your Honor.

Mr. Gregory: No, he assumes. Of course the question amounts to this, assumes there was something suspicious, "What would you do?" I conceded at once they ought to do something.

Mr. McCord: Counsel asked him the question, if there was not anything suspicious what he would do. Now I simply put it in the converse form.

Mr. Gregory: The question may it please the court, must refer to the actual condition of affairs. We are not dealing with purely hypothetical questions.

133 The Court: The question Mr. McCord asked of this witness a while ago was if there was anything to excite suspicion.

Mr. Gregory: Yes.

The Court: Now, that is a fact. I don't know whether the witness knows enough to answer it or not, whether he is possessed of knowledge. On cross examination they have a right to ask him.

Mr. Gregory: May it please the court, if the question is this way, "if there was something suspicious, was it the duty of the bank to do something?" which of course must require the obvious answer "Yes, I concede that, it is a self-evident and patent fact, but the question here is, "Was there anything suspicious?" I will submit to the ruling.

The Court: I will overrule the objection.

Mr. Gregory: Note an exception.

The Court: Exception allowed.

(Mr. McCord:)

Q. Answer the question.

A. We should at once take such steps——

The Court (interrupting): Oh, no.

(Mr. McCord:)

Q. Don't say what you would do. I ask you what the usage was.

A. To take such steps as would protect the drawer, the actual owner of the goods.

Q. And what would you mean by taking such steps as would protect him?

Mr. Gregory: I make the same objection, may it please the court, to all of this examination.

The Court: Overruled.

Mr. Gregory: Exception.

A. Take possession of the goods, get them out of the possession of the drawee.

Redirect examination.

(Mr. Gregory:)

Q. Have you ever been in Port Arthur, Mr. Spencer?

A. I have not.

Q. So that whatever you have testified to concerning the custom has been what you have heard from others?

A. No, it is commercial usage.

134 Q. Who was to pay the freight in connection with the shipment of the "Hyades," do you remember?

A. Mr. Clarkson.

Q. Mr. Clarkson. So if the Russo-Chinese Bank had tried to move this cargo out of the warehouse or away from the Steamboat

Company, they would still have had to pay the freight, wouldn't they?

A. To Mr. Clarkson.

Q. No, to the Steamboat Company.

A. Not if the freight had already been paid.

Q. But I just ask you where it was to be paid?

A. In Port Arthur.

Q. Yes. Now, assuming Clarkson & Co. had not paid it, if the bank were to get it out of Clarkson's warehouse they of course would have had to pay the freight?

A. Certainly.

Recross-examination.

(Mr. McCord:)

Q. Do you know anything of your own knowledge as to who was to pay the freight, Mr. Spencer?

Mr. Gregory: The bill of lading speaks for itself.

A. It was not, from my memory, a C. I. F. draft.

(Mr. McCord:)

Q. What is that?

A. It was not their custom to draw C. I. F. drafts.

(Mr. Gregory:)

Q. What does that mean, Mr. Spencer?

A. That means all charges paid on this side, costs, insurance and freight.

(Mr. Gregory:)

Q. I would like to know what those words stand for—"C. I. F."?

A. I don't now remember what "C." stands for. "I." for "insurance" and "F." for "freight."

(Mr. Dorr:)

Q. Cartage, isn't it?

A. Costs, I think.

(Mr. Gregory:)

Q. Costs, insurance and freight?

A. I think it is costs, but I would not be positive as to that.

(Witness excused.)

H. F. OSTRANDER, produced as a witness on behalf of plaintiff, testified as follows:

I live at Seattle. I am in the shipping business. I was
135 connected with the Centennial Mill Company for about ten years, beginning with 1898, and running to the fall of 1907. From 1901 to 1905 I represented the Mill Company on the Coast of Asia, from the Philippines to Vladivostok, which took in Port Arthur. My headquarters at first were in Shanghai, but afterwards

in Kobe, in 1903 and '4. I have been in Port Arthur. At that time it was a town of between thirty and forty thousand, and was a place of importance in supplying goods to the Russian troops. I knew the firm of Clarkson & Co. from the spring of 1898. The Centennial Mill Company did business with Clarkson & Co. from that time on to the extent of several hundred thousand dollars a year, all in flour. Shipments were made to Vladivostok, Port Arthur and Dalny. Dalny is about forty miles east of Port Arthur. Clarkson had a warehouse system in each place. I was in Port Arthur late in January and early in February, 1904, four or five days before the outbreak of the war. I was there in business of the Centennial Mill Company. Visited Clarkson & Co. at the time. The reputation of Clarkson & Co. commercially was first class as far as I could find out. There was no special arrangement with our concern in regard to the shipment of flour over there by the Boston Steamboat and Boston Towboat Company's boats. Clarkson & Co. were the agents of those companies at Port Arthur up to the outbreak of the war. It was a well known fact that Clarkson & Co. were agents. Boats ran about once a month. Our shipments would be about eighty per cent. of the cargo for Port Arthur and Dalny. A full cargo, if all flour, would be from one hundred and fifty to two hundred thousand sacks. Business between the Centennial Mill Company and Clarkson & Co. was transacted I think by Mr. Thomsen, president of the Mill Company, who was out there in 1908 and '9 and again in 1901 on the company's business. When I was there in 1904 there was some rumors of war, but it was not expected soon. I was in Port Arthur probably a week, and went from there to Tientsin. I met Davidson. He and I left Port Arthur on the same steamer for Chin Wan Tau. I did not see the Boston Towboat Co. ship "Pleiades" at Port Arthur on that voyage. I saw her afterwards at Che Fu. While at Port Arthur I saw the officers
136 of the Russo-Chinese Bank. According to my usual custom I gave the bank no instructions, nor did I make any request as to what it should do, if anything, in connection with goods which had been sent under drafts and bills of lading which it held. I don't think I was authorized to give any such instructions. If anybody had been so authorized it would have been myself probably. I believe the "Hyades" arrived there some time previous to my arrival several week before. I think some of the "Hyades" flour was there at the time. There was some flour on hand which I saw. I could not say how much. Perhaps five or ten thousand sacks or more. Couldn't say. I gave no instructions to the bank about the "Hyades" flour.

Cross-examination:

I stated in my direct examination that it was a well understood fact at Port Arthur that Clarkson & Co. were the agents of the Towboat Company. The Bank could not have helped knowing it.

Afternoon Proceedings.

February 28, 1912.

ARTHUR T. SHORT, produced as a witness on behalf of defendant, having been first duly sworn, testified as follows:

(Mr. McCord:)

Q. What is your name?
A. Arthur T. Short.
Q. How old are you?
A. Thirty-nine.
Q. Where do you reside?
A. South Porcupine, Ontario.
Q. How long have you resided there?
A. About a year.
Q. Prior to that time where did you reside?
A. In Colbalt.
Q. How long did you reside there?
A. Four years.
Q. In the years 1903 and '4—from 1899 to 1904 where did you reside?
A. In Port Arthur, China.
Q. What business were you engaged in there, Mr. Short?
137 A. I was a bookkeeper for Clarkson & Company up to August, 1902, and after that date I had charge of the books, and joint manager, up to February 4, 1904.
Q. When did you first enter the employ of Clarkson & Company?
A. In December, 1899.
Q. At what place?
A. At Port Arthur.
Q. And how long did you remain with Clarkson & Company after that?
A. Up until February 4th, 1904.
Q. Where were you in the month of January?
A. In Port Arthur.
Q. Were you away from there during the last year at any time, that is, between the first of January, 1903, and the 4th of February, 1904?
A. Oh, I was at Tientsin and Chinwangtau.
Q. How frequently?
A. Beg pardon?
Q. How frequently were you there?
A. Oh, I was there twice.
Q. At what time?
A. Oh, it would be about February, 1903, the first, and along in the summer.
Q. Of 1903?
A. 1903.
Q. When did you say you became manager of the Clarkson business?
A. In August, 1902.

Q. Who was the other manager? You say you were jointly?
A. W. S. Davidson.
Q. Mr. Short, you may just state what your duties were as joint manager, what you did in connection with the Clarkson business?
A. Well, we bought and sold goods; we were agents for steamships, and just the regular duties of manager of a branch office.
Q. Did you make contracts——
A. (Interrupting.) Yes.
138 Q. (Continuing:) —for the firm? What business was Clarkson & Company engaged in at Port Arthur?
A. He was engaged in the mercantile business, agent for steamboat companies, insurance companies, and so on.
Q. Do you recall the arrival of the ship "Hyades" at Port Arthur?
A. I do.
Q. In January, 1904?
A. I do.
Q. Do you recall the date that she arrived?
A. Well, I can't state the exact date, but it was around the middle of the month.
Q. Yes. Was any cargo unloaded from that ship, from the Centennial Mill Company?
A. Yes.
Q. Of what did it consist?
A. Well, there was flour for Clarkson——
Q. (Interrupting.) How much flour?
A. Thirty-six odd thousand bags.
Q. Now, do you recall anything about a draft being drawn at that time by the Centennial Mill Company on Clarkson & Company for that shipment of flour?
A. Yes, there was a draft drawn.
Q. Just state what it was?
A. Well, it was a draft, the same as all drafts from Centen-ial mills, at ninety days' sight.
Q. And was it a draft unsecured or with documents?
A. There were documents attached.
Q. What documents were with it?
A. There was a bill of lading and copy of the invoice, and the insurance policy.
Q. Anything else that you recall.
A. No.
Q. When did the draft arrive at Port Arthur, do you know?
A. The draft arrived about the same date that the ship arrived.
Q. How?
A. The draft arrived about the same date that the ship did, within a few days of the boat.
139 Q. Was it presented to Clarkson & Company by the bank—or who received the draft?
A. The Russo-Chinese Bank.
Q. Was it presented to Clarkson & Company?
A. Yes.
Q. When was it presented, do you know?

(No response.)

Q. Was it accepted?

A. Yes, it was accepted.

Q. When?

A. It was accepted within two or three days after the steamship or—after the steamship arrived, during the discharging of the boat.

Q. How much was the draft for?

A. Thirty-six thousand odd dollars, gold.

Q. Do you know who accepted it on behalf of Clarkson & Company?

A. I accepted it.

Q. How was it accepted?

A. It was written across the face of the draft, "Accepted. Clarkson & Company, at ninety days' sight from date, Clarkson & Company per A. T. Short."

Q. That was you think about what time?

A. Of, that would be somewhere I should judge about—or from the 20th to the 25th, I am not sure of the date.

Q. Of January, 1904?

A. Of January, 1904.

Q. When the goods arrived, where were they put?

A. They were—from that boat they were put in Clarkson's go-down.

Q. What boat was this, you say?

A. This was the "Hyades."

Q. Put in one place?

A. Into Clarkson's go-down—Clarkson's warehouse.

Q. What is a go-down?

A. Well, it is a warehouse for storing cargo.

Q. It is like one of the docks here, built out into the water, or on the mainland?

A. No, it was on the mainland.

140 Q. Can a ship get up to the go-down?

A. No, the boats were always discharged out in the—into lighters out in the basin. There were no docks there at all.

Q. After the acceptance of the draft, I will ask you, Mr. Short, to state whether or not you had any arrangement with the Russo-Chinese Bank in regard to the sale of the flour by Clarkson & Company. If so, state what the arrangement was?

A. When we accepted drafts on flour, we gave the Russo-Chinese Bank——

Mr. Gregory (interrupting): You are now being directed towards this special draft.

Mr. McCord: Yes.

Mr. Gregory: This special draft.

A. Well, when we accepted this special draft we gave a letter of guarantee to the Russo-Chinese Bank—that was a letter that the cargo was the property of the Russo-Chinese Bank until paid for.

(Mr. McCord:)

Q. What else did it provide?

A. I can't give you the whole wording of the thing; that is the gist.

Q. Well, in regard to the sale of it?

A. Beg pardon?

Q. Was there anything in the agreement regarding the sale of the cargo?

A. Well, we sold the—we would sell the flour.

Q. I asked you what was in the agreement in regard to your selling of the flour?

A. Well, the letter of guaranty was that we would sell the flour and deposit the money in the bank.

(Mr. Gregory:)

Q. Have you the letter here, Mr. Short?

A. Beg pardon?

(Mr. Gregory:)

Q. Have you the letter, or a copy of it, here?

A. No, sir. I have not. It was the regular form of bank guaranty; it was a printed form.

Mr. McCord: We demanded the original a year ago.

Mr. Gregory: We haven't got it.

Mr. McCord: You haven't got it?

Mr. Gregory: No.

(Mr. McCord:)

141 Q. Well, when was this letter of guaranty containing the provisions that you have named, executed with reference to the acceptance?

A. At the time of the acceptance of the draft.

Q. What became of the documents?

A. The documents were left at the bank. Oftentimes we took the documents; others we left them there.

Q. What did you do in this case?

A. They were left there.

Q. With the Russo-Chinese Bank?

A. Yes. I went to the bank, accepted the draft, and gave the letter of guaranty, and then the papers, instructions, were handed over to the shipping clerk in Clarkson's office to look after the rest of it.

Q. Then how long after this letter of guaranty was executed between you and the Russo-Chinese Bank was it until you began to sell the flour?

A. Well, we had some old cargo, some old flour in the warehouse, which we always made it a point to dispose of first, because it was simply piled on the ground, and we got rid of the old flour before we tackled the new.

Q. Can you give any estimate of the quantity of flour that was in the go-downs upon the arrival of the "Hyades" flour?

A. There was probably from six to eight thousand bags.

Q. And where did you get that flour from?

A. That flour came from the Centennial Flour Mills, or the bulk of it; I think there was a small shipment of a thousand bags that came in from a concern—Sprague somebody, that would have been in with that lot.

Q. You say you left the employ of Clarkson on the 4th of February?

A. 4th of February.

Q. How many sacks of flour—if you know, state—were sold by you between the time of the acceptance of the draft and the time that you left Clarkson & Company's employ?

A. Well, sold by Clarkson's office, including myself, I should say about probably ten or twelve thousand bags.

Q. And to whom was that sold?

142 A. Oh, it was sold mostly through the comprador by Clarkson & Company, to Chinese contractors working on the forts and on the government roads and——

Q. (Interrupting.) Were the purchasers of this flour responsible people financially?

A. They were all guaranteed by the comprador, who was guaranteed by other responsible Chinese.

Q. Was any other flour other than the shipment of the "Hyades" flour—any flour subsequent to the arrival of the "Hyades" flour, delivered to Port Arthur prior to the time you left there or about the time you left?

A. No.

Q. After you left on the 4th did any other shipment come in?

A. Yes, there was a boat, the "Pleiades" arrived there the day previous to the war.

Q. That was about the——

A. (Interrupting.) 7th.

Q. (Continuing:) The 7th. The war commenced when?

A. At twelve o'clock on the night of the 8th.

Q. Was any flour unloaded from the "Pleiades"?

A. The "Pleiades"?

Mr. Dorr: He says he was not there then.

Mr. McCord: He stayed at Port Arthur.

Mr. Dorr: Did you say you had left Port Arthur?

A. No, I was not with Clarkson at that time.

(Mr. Dorr:)

Q. You were still in Port Arthur?

A. I was still in Port Arthur. Yes, there was loaded into the lighters from that boat I should say from 1,500 to 2,000 sacks.

(Mr. McCord:)

Q. How long did the "Pleiades" remain in port?

A. Remained there until the—oh, I don't know, 14th or 15th; I am not sure of the date.

Q. Did you leave Port Arthur on that vessel?

A. I left on that vessel.

Q. On the "Pleiades"?

A. On the "Pleiades."
Q. Where did she take the cargo of flour to?
A. To Che-fu.
Q. Unloaded it there?
A. Unloaded it there into Cornaby-Eckford's go-downs.
143 Q. From what source did Clarkson & Company get their flour during the year 1903?
A. Mostly from the Centennial Mills.
Q. What do you mean by "mostly"?
A. Well, they had that small shipment from Sprague, and I bought one small shipment of 500 or a thousand bags from the Ogleby Flour Mills of Montreal.
Q. How much was the Sprague shipment?
A. About a thousand bags.
Q. What quantity of flour did you handle at Clarkson & Company during the year 1903?
A. I can't tell you exactly; probably in the neighborhood of a couple of hundred thousand bags; perhaps more than that.
Q. All of that flour you say was gotten from the Centennial Mills —practically all of it?
A. Yes, as far as I——
Q. (Interrupting.) Now, state how that was sold to Clarkson & Company?
A. Draft, ninety days' sight, bill of lading attached.
Q. When was the payment to be made?
A. Payment was made as the flour was sold, money was deposited in the bank. When the draft matured, then the draft was taken by Clarkson & Company, paid in full.
Q. What I am trying to get at is, what sort of drafts were they, were they drafts against payment or drafts open?
A. Drafts against documents.
Q. Yes, documents attached?
A. Documents attached.
Q. To be delivered when, upon payment?
A. Upon payment.
Q. Now, in all your dealings with the Russo-Chinese Bank, in handling the other shipments of the Centennial Mill Company, I will ask you what arrangement if any was made with the bank in regard to the handling of this flour?

Mr. Gregory: We object to the question as incompetent, irrelevant, immaterial and not binding in this special case.
The Court: I overrule the objection.
Mr. Gregory: Note an exception.
144 A. Will you give me the question again, please?

(Mr. McCord:)

Q. I want to know what course of dealing Clarkson & Company had with the Russo-Chinese Bank in regard to other shipments of flour prior to the "Hyades" flour.
A. Well, from the year 1900 the same rule existed. We always

gave the bank a letter of guaranty against—a letter of guaranty to take delivery of the cargo and the cargo belonged to them until it was paid for, and we sold it out and deposited the money in the bank from time to time as Clarkson & Company got it in.

Q. Now, I will ask you whether or not the bank knew, in the handling of this flour, that Clarkson & Company were in possession of it?

A. Whether the bank knew whether Clarkson & Company were in possession?

Q. Yes.

A. Certainly they did.

Q. Did they know that Clarkson & Company were in possession of the "Hyades" flour, 36,000 sacks?

A. They could not help but know it.

Mr. Gregory: I ask that the answer go out as not responsive.

The Court: Motion denied.

Mr. Gregory: Note an exception.

The Court: Exception allowed.

(Mr. McCord:)

Q. Did you discuss the matter with them?

A. When we went to the manager of the bank and accepted the drafts and gave the letter of guaranty, it was done with the manager of the bank.

Q. Who was the manager of the bank?

A. A. V. Ofsvankin.

Q. Who is the other manager of the bank?

A. There was a man by the name of Friedberg, but he was not a joint manager, he was simply an attorney to sign drafts and things; and Mr. Berg, one of the directors of the bank from St. Petersburg, was also there inspecting.

Q. Let me bring your attention down to January and February, 1904, and up to the time you had left there, who was the manager of the Russo-Chinese Bank?

145 A. Ofsvankin.

Q. The same man you have just mentioned?

A. Yes sir.

Q. What was his position?

A. What was his position?

Q. Yes.

A. Manager of the Russo-Chinese Bank.

Q. Was anyone of equal authority with him?

A. No.

Q. Or was he sole manager?

A. No, he was the manager.

Q. Do you know where he is now?

A. I don't know where he is.

Q. With what persons did you have your conversation in regard to this "Hyades" flour?

A. With the manager of the bank.

Q. Ofsvankin?

A. Ofsvankin.

Q. I will ask you whether this letter of guaranty recognizing the ownership of the flour in the bank and permitting it to be sold and accounting for the proceeds to the Russo-Chinese Bank—whether that applied to the other shipments of flour?

Mr. Gregory: Objected to as leading.

The Court: It is leading, but it is unimportant. I will overrule the objection.

Mr. Gregory: Note an exception.

The Court: Exception allowed.

A. What was the question again?

(Mr. McCord:)

Q. I will ask you whether this same arrangement which you have detailed in regard to the "Hyades" flour applied to other shipments of flour made by the Centennial Mill Company to Clarkson & Company prior to that time?

A. Yes.

Q. I will ask you if Clarkson & Company were ever the agents of any steamship companies?

A. They were.

Q. Of what steamship companies?

A. They were agents for Butterfield & Swire, Jardine-Matheson, the Chino Navigation Company, the Boston Tow Boat Com-
146 pany,—of various other steamers that would come in there—tramp steamers.

Q. What company owned the steamship "Hyades"?

A. The Boston Tow Boat Company.

Q. Clarkson & Company were agents for that boat?

A. They were agents.

Q. When did Clarkson & Company become the agent of that steamship company?

A. Oh, I don't know.

Q. How long before January 1st, 1903?

A. I can't state definitely; probably six months or maybe a year. It was a new line of steamers running into Port Arthur.

Q. I will ask you whether the Russo-Chinese Bank knew that Clarkson & Company were the agents of this steamship company?

A. They knew it when the first consignment of flour.

Q. How do you know

A. Because they were told when the drafts were accepted and the letter of guaranty given to the bank.

Q. Who told them?

A. I would tell them or Davidson would tell them. The object of getting a ninety days' sight draft was that we could get delivery of the flour without payment, and that we paid in the money as soon as we got it—as soon as the flour was sold the money was collected in.

Mr. Gregory: I ask that the portion of the answer beginning with "the object" to the end go out as not responsive.

The Court: The motion is denied.
Mr. Gregory: Exception.
The Court: Exception allowed.

(Mr. McCord:)

Q. How many warehouses were there in Port Arthur doing business?

A. There was Ginsburg, who occupied the warehouse formerly occupied by Clarkson and belonging to the bank; there was the Chinese Eastern Railway Seagoing Service had a go-down, and I think that is all.

Q. Three?

A. Three. There may have been one or two little ones that I don't remember.

147 Q. I will ask you whether the Russo-Chinese Bank and Clarkson were ever engaged jointly in the warehousing or go-down business.

A. From 1900 up to the beginning of 1903 the Russo-Chinese Bank owned the warehouse and were agents for a Russion steamboat company, and Clarkson operated that go-down or warehouse for the Russo-Chinese Bank; that is, they would land the cargo from the bank's steamers—the steamers consigned to the bank,—they would land the cargo in the warehouse, along with their own, and they paid the bank a monthly rental, as well as a commission on their stevedoring charges.

Q. I will ask you whether at the time of the arrival of this flour there was any insurance taken on it, and, if so, by whom?

A. Clarkson carried insurance on his flour, or on the flour and rackarock beer and general goods of his own in his warehouse, and this insurance was held or transferred to the Russo-Chinese Bank as security against fire.

Q. Do you remember a draft of $4,136 that arrived at Port Arthur in November and matured about the 8th or 21st of March, also one of $16,155?

A. Yes sir.

Q. Maturing some time in March, 1904?

A. Yes sir.

Q. I will ask you, Mr. Short, whether or not those drafts were accepted?

A. Those drafts were accepted.

Q. They were drawn by whom?

A. By the Centennial Mill Company.

Q. Through what bank here?

A. Through the National Bank of Commerce.

Q. And were there any documents attached to them?

A. Yes.

Q. How were the drafts drawn with reference to payment?

A. Ninety days' sight, documents attached.

Q. To be delivered on payment?

A. On payment.

Q. I will ask you what if any arrangement was made with the

Russo-Chinese Bank in regard to the flour securing the $4,136 draft and the one securing the $16,155 draft?

148 Mr. Gregory: We object to the question as incompetent, irrelevant and immaterial, and not referring to the draft in question.

The Court: I overrule the objection.

Mr. Gregory: Note an exception.

The Court: Exception allowed.

A. The same arrangement as was made with the "Hyades"; that was an arrangement which had been going on from the time I went there.

Mr. Gregory: I ask that the last part of the answer go out as not responsive, and ask that the witness be instructed not to be so ready in answering.

The Court: No, I decline to give that instruction. He is being examined in chief, but most relevant matter sometimes comes out in that way.

Mr. Gregory: It may be so, Your Honor, but he should be interrogated.

The Court: He should answer fully the questions that are asked him, tell the truth, the whole truth and all about it.

Mr. Gregory: Swiftness is not considered a virtue sometimes in a witness, Your Honor.

Mr. McCord: I ask for an exception to the counsel's remark.

The Court: You may have an exception.

(Mr. McCord:)

Q. I will ask you what became of the flour securing these drafts?

A. They were put into Clarkson's warehouse and afterwards sold.

Q. What became of the proceeds of the flour?

A. Deposited in the Russo-Chinese Bank, to the credit of Clarkson & Company.

Q. What became of all of the proceeds of the sale of Clarkson's goods, of the earnings of his firm, where were they deposited?

A. They were deposited in the Russo-Chinese Bank.

Q. Was there any other place for their deposit there?

A. No, no.

Q. I say, were they deposited anywhere else?

A. No, everything was put into the Russo-Chinese Bank.

149 Q. Did you know the firm of Ginsburg & Company?

A. I did.

Q. What was their financial standing?

A. Oh, Ginsburg & Company were worth millions.

Q. Now, Mr. Short, when did you send in your resignation, if at all, to Clarkson & Company, as joint manager of his institution at Port Arthur?

A. I wrote Mr. Clarkson about or on the first of January, 1904, giving him the usual month's notice from his company.

Q. And did you receive a reply to that letter?

A. I did.

Q. Were you let out or did you resign?

A. No, I resigned. Davidson and myself did not agree and so I had formed connections with Guntz and Albers on joint account and went on with them.

Q. Prior to the time, the 4th of February, when you say you left the employ of Clarkson & Company, were you devoting your time or any of your time to other business?

A. No, no, that was being attended to by Guntz and Albers, and I was closing up the books with Chochovitz and looking after my own interests, that I would get my own commission which was coming to me on the profits of the business.

Q. Were you to get any of the profits of the business that Clarkson did?

A. On the profits of Clarkson's business.

Q. Did you ever get it?

A. No, I didn't.

Q. What was the financial reputation of Clarkson & Company's business at Port Arthur during the year 1903 and up to the outbreak of hostilities between Russia and Japan?

A. Clarkson's financial standing in Port Arthur was all right. He always had sufficient money on his books and cargo in the godowns to cover any liabilities that he might have.

Q. I will ask you if in 1903 Clarkson and Company had any overdraft arrangement with the Russo-Chinese Bank, and, if so, for how much and how long had it been standing?

A. In 1903 there was an overdraft of Clarkson & Company at the bank—oh, varying from fifty thousand up. That overdraft,
150 when I went to Clarkson in 1899, was somewhere around $90,000.

Q. Roubles or dollars?

A. Ninety thousand roubles, and that had never interfered with the business of Clarkson & Company.

Q. Well, state what arrangement was made, if any, with reference to the retirement of that overdraft by notes or drafts?

A. In the early part of December Mr. Clarkson came to Port Arthur and Mr. Ofsyankin, the manager of the bank, made an arrangement with him by which he was to wipe off that fifty thousand roubles at three thousand roubles a month—three thousand roubles a month, by drafts drawn by Clarkson & Company, Port Arthur, on Clarkson & Company, Vladivostok; these drafts were to be paid in Vladivostok.

Q. How was it carried on your books?

A. It was wiped off the books by these drafts and credited to Clarkson of Vladivostok.

—. Referring to the deposition of Friedberg, I think it is, that part of it known as Clarkson's account, I will ask you to turn to that (handing paper to witness)?

A. Here is an account with—a copy of Clarkson's account from December, 1903.

Q. Does that fifty thousand overdraft appear on that account?

A. It does.

Q. Down to what date?

A. Well, it is carried along right through the whole shooting match.

Q. What did you say had been done with that reference to drafts?

A. That had been settled by drafts at 3,000 roubles a month. Two thousand was the first draft and the balance were 3,000 a month, payable in Vladivostok.

Q. And then Clarkson & Company, if I understand you correctly, took credit for that fifty thousand roubles that was taken up by drafts on Clarkson & Company at Vladivostok?

A. I didn't catch that.

Q. I say, the overdraft was wiped out and drafts taken on the other, was it?

151 A. On Vladivostok. There was an overdraft at Port Arthur on the beginning of 1904; it had been closed off by drafts on Vladivostok and accepted by the bank.

Q. Are you able to state from your examination of that account whether or not if that fifty thousand roubles that had been taken off by these drafts—if Clarkson was given credit for that 50,000 roubles or was he still charged with it?

A. Well, according to this statement he is still charged with it.

Q. Now, I wish you would turn to the cash account in the same deposition and state how much money was remitted by the Russo-Chinese Bank from Port Arthur to Vladivostok from January, 1904, down to August, 1904. Are you able to state it from that?

Mr. Gregory: We object to the question on the ground that the witness is not qualified as an expert yet.

Mr McCord: He said he was a bookkeeper.

Mr. Gregory: Do I now understand he is being called upon to give expert testimony concerning the evidence produced by the plaintiff?

Mr. McCord: I am not asking for that, I simply want him to figure the books—total it, Your Honor.

Mr. Gregory: The books show for themselves.

Mr. McCord: They will show it in detail, but I simply want a resume of it.

The Court: I think you are entitled to it. Objection overruled.

Mr. Gregory: Note an exception.

A. (After examining and figuring) 79,000 roubles transferred from Port Arthur to Vladivostok from the 25th of March to the 26th of June.

(Mr. McCord:)

Q. Is that all it shows?

A. That is all that I can pick out here.

Q. Well, to whom was it transferred?

A. It was transferred, according to this, to Clarkson & Company of Vladivostok.

Q. Are you able to state how much money was collected in or

received by the bank at Port Arthur from Clarkson & Com-
152 pany, between the 25th of January and down to so far as the account goes, August, I believe.
A. From these accounts I guess I am.
Q. Yes, from those accounts?
A. I think so.
Q. What is that?
A. I think so.

Mr. Gregory: What year?
Mr. McCord: 1904.

A. (After examining and figuring) From the first of January, 1904, up to the last statement on this account, November 23, there had been deposited with the bank 126,928 roubles and 97 kopeks.

(Mr. McCord:)

Q. How many roubles?
A. 126,128-97.
Q. You have compared it, have you, so that you think that is accurate?
A. I have not gone through it the second time; I think that is about right, though. (Witness figuring) That is as near correct as I can make it.
Q. Mr. Short, at the time you left Clarkson's employ I will ask you to state what goods were on hand other than flour, if any?
A. There was some rackarock.
Q. How much rackarock?
A. Oh——
Q. In roubles?
A. Oh, probably ten or fifteen thousand roubles.
Q. And what else, anything?
A. And some beer.
Q. How much beer?
A. Oh, probably two thousand dollars.
Q. And do you know the market price of flour at the time you left there?
A. It was selling from two forty to two-sixty five roubles.
Q. A sack?
A. A sack.

153 Cross-examination.

(Mr. Gregory:)

Q. What is your present business, Mr. Short?
A. I am in the mining machinery and supply business.
Q. At What place?
A. At South Porcupine, Ontario.
Q. South Porcupine, Ontario. What is the street address?
A. Beg pardon?
Q. What is your street address?
A. No street.

Q. South Porcupine, Ontario?
A. South Porcupine?
Q. Oh, yes. Have you come here purposely to be a witness in this case?
A. Beg pardon?
Q. Have you come here purposely to be a witness in this case?
A. I have.
Q. You came here once before also, did you not?
A. Yes sir.
Q. How much time have you been spending as a witness on this case?
A. I left home on the 10th of the month?
Q. And before, how long were you gone?
A. I was here about five weeks.
Q. About five weeks. Have you any associate in your business?
A. I have.
Q. And he carries on the business in your absence?
A. Yes.
Q. Mr. Short, you say you left the firm of Clarkson & Company at what time?
A. On February 4, 1904.
Q. You have heard read here the depositions of Mr. Davidson and also Mr. Clarkson, have you not?
A. I have.
Q. You know these gentlemen have said you left the firm in December, 1903?
154 A. That I did?
Q. Is that statement correct?
A. No sir.
Q. It is absolutely false, is it?
A. It is wrong. I don't say intentionally wrong, but it is wrong
Q. It is positively wrong?
A. It is positively wrong.
Q. You left the firm permanently you say at what date?
A. On February 4, 1904.
Q. And you left them entirely of your own initiative?
A. Yes, there was differences between Davidson and myself which we could not settle and so it was me to get out.
Q. What was that difference about?
A. Oh, different things, Davidson wanted to be the big man and I would not consent.
Q. I see. How long had you and he been acting together?
A. From August, 1902.
Q. Have you any personal knowledge of the transactions connected with the Ginsburg sale, were you in Clarkson's employ at that time?
A. No, no.
Q. Do you know or have you any personal knowledge concerning the payment of this draft of the "Hyades" flour?
A. I don't just catch your question.
(Question read).
A. No.

Q. You were not in the employ of Clarkson & Company at that time?

A. No.

Q. And that draft became due about the 30th of April, 1904, didn't it?

A. No, I was not.

Q. So you know then——

A. (Interrupting.) Know nothing whatever of the payment.

Q. Now, Mr. Short, regarding this document which you say was given by Clarkson & Company, will you please state, as nearly as you can, the exact language of that document?

155 A. It is pretty hard for me to state it. It read something that the cargo was delivered to Clarkson & Company on the guaranty that the cargo was the property of the bank and that as it was sold and paid for the money was to be turned in to the Russo-Chinese Bank.

Q. Who signed that document?

A. Who signed it?

Q. Yes?

A. I signed it.

Q. You signed it?

A. I signed it.

Q. And was your signature the only one?

A. Mine was the only one to that document.

Q. It had been your custom, you say, after that to proceed to sell the flour?

A. Sell the flour.

Q. And you put the money in the bank?

A. Put the money in the bank.

Q. What did you do about the insurance when you sold the flour, as to the remaining insurance, you simply had a blanket insurance, did you?

A. Clarkson & Company had insurance on their—the contents of the warehouse for—I can't tell you exactly what, somewhere around 50,000 rubles, and that was carried all the time.

Q. This document which you signed was given to the bank?

A. To the bank.

Q. And what did the bank give you?

A. What did the bank give us?

Q. Yes.

A. Permission to take the cargo.

Q. Did it give you any writing?

A. No.

Q. No writing at all?

A. No writing.

Q. Didn't they deliver you the documents sometimes?

A. Sometimes they did. If we asked for them we would get them.

Q. Didn't you always ask for the documents?

A. No.

156 Q. If it appears that the documents were not delivered wouldn't it persuade you that this arrangement was not made in the particular case?

A. No, because I would accept the draft and then make the arrangements and then go over to the office and hand it over to the shipping clerk.

Q. So that the only thing that was done was that you would sign this letter?

A. Yes.

Q. And then you would have a sort of an oral talk with the manager?

A. Yes.

Q. Then you would proceed to go and sell the flour?

A. Sell the flour and turn the money in to the bank.

Q. You would take the flour out of the warehouse of Clarkson & Company, shipping agents?

A. Yes.

Q. Not Clarkson & Company, Importers?

A. No, Clarkson & Company, Importers.

Q. How did the flour get from the warehouse of Clarkson & Company, agents of the steamboat, into the warehouse of Clarkson & Company, Importers.

A. By Clarkson & Company.

Q. Clarkson would simply shift it from one to the other?

A. Yes sir.

Q. At the time that Clarkson & Company, steamship agents, shifted it into the hands of Clarkson & Company, importers, was any document turned over?

A. Not in this case, they were in the hands of the bank.

Q. In the hands of the bank?

A. In the hands of the bank.

Q. So that Clarkson & Company delivered the flour to Clarkson & Company, importers, without the surrender of bill of lading, didn't they?

A. Yes, in that case they did.

Q. Didn't you know that the bill of lading said that the goods should only be surrendered when the bill of lading was given up?

A. Didn't I know that what?

157 Q. Didn't you know that the bill of lading states that the goods are not to be surrendered by the steamship company until the bill of lading is given up?

A. Yes, the draft reads documents against payment.

Q. No, what I am asking now is about the bill of lading. Don't you know that this bill of lading states that the steamship company will not surrender the goods until the document with the bill of lading is given up?

A. I never noticed it particularly.

Q. Yet it is a fact, however, that you, as the agent of the steamship company, did put this flour into Clarkson & Company, importers, warehouse, without the production of the bill of lading?

A. With the consent of the bank.

Q. No, I am not asking that. Without production of the bill of lading?

A. Without the bill of lading in that case.

Q. Without the bill of lading at all. You say this draft was accepted when?

A. It was accepted—I am not positive, but between the—somewhere between the 17th and the 25th, I should say.

Q. Of January, 1904?

A. Yes. It was while the boat was being unloaded or just after it had been unloaded, I would say.

Q. I think the evidence shows that the boat reached there about the 16th of February. About what time, then, would you say that this flour was fully discharged?—I mean January?

A. 16th of January.

Q. What time was this flour fully discharged from the "Hyades"?

A. Well, it would take probably a week or ten days to discharge.

Q. So that it would have been fully discharged on or about the 26th?

A. Somewhere around there, sir.

Q. I call your attention to the fact that the "Hyades" left Port Arthur on January 22nd?

A. 22nd. Well, that may be.

Q. So that it would have been fully discharged at that
158 time?

A. It would have been discharged, yes.

Q. Now, how long after the flour was taken out of the boat was it that you took it out of your warehouse and proceeded to sell it to other people?

A. Well, it would be after the old flour which we had in the godown had been sold.

Q. Have you any idea when that was?

A. No, I have not.

Q. Have you any idea whether any of this flour was ever sold by Clarkson & Company—this "Hyades" flour?

A. No, I would say that there had been sold to people up to the time I left Clarkson probably eight to ten thousand bags of flour.

Q. Eight or ten thousand bags?

A. Yes, that is, from the date of the arrival of that boat.

Q. So that the remainder of it, which would be about twenty-five to twenty-six thousand bags, was still in the warehouse, was it?

A. Well, I figure that there would be probably from twenty-five to thirty thousand bags remained in the warehouse.

Q. Still in the warehouse. If it should appear that this draft did not reach Port Arthur until January 22nd, the day the boat left, and that it was not accepted until January 30th, would that make any difference in your testimony?

A. Well, I might be mistaken in the date, I can't say exactly, you see.

Q. The situation in which you left this employment and the subsequent war were very exciting times, weren't they?

A. They were.

Q. And you don't pretend, do you, now, to tell the jury that your recollection is perfectly fresh and clear about all these transactions?

A. No, I am only telling you, after giving the thing a good deal of study and thought, working it out as near as possible.

Q. You have been thinking over what the facts were and your testimony in this case for a long time, haven't you?

A Going through the evidence, and from what I know.

Q. That is, you were down here in Seattle about say two years ago perhaps?

159 A. Two years ago.

Q. Two years ago. Now, to whom, if you know, did Clarkson & Company sell that 8,000 sacks of flour?

A. Oh, to—it was sold through the Comprador to various Chinese and to—possibly to Russians or foreigners in the port.

Q. Was it paid for?

A. No. The cargo was—that which was sold to the Chinese Comprador was charged to the Comprador and he collected in from his customers and paid in to the firm of Clarkson & Company.

Q. And he did pay it in, did he, to Clarkson & Company?

A. Not all.

Q. Well, how much did he pay?

A. The Comprador always had outstanding probably from twenty to thirty thousand rubles.

Q. But I ask you to be specific about this particular consignment. How much, if you know, did the Comprador pay on this 8,000 sacks of flour which you say were sold out of this flour?

A. Well, probably nothing.

Q. Probably nothing?

A. Probably nothing. I can't state that.

Q. Now, of your own knowledge, Mr. Short, can you positively state that you know whether any of this flour from the "Hyades" was sold while you were there?

A. From the "Hyades"?

Q. Yes.

A. I can—no, I can't.

Q. You cannot?

A. I cannot state positively—the "Hyades."

(Mr. McCord:)

Q. What was that question?

A. If I state positively that any of the flour from the "Hyades" was actually sold up to the time I left.

(Mr. Gregory:)

Q. The facts were that there was a great deal of flour in the warehouse, was there not?

A. There was from six to eight thousand sacks, I figure.

Q. And whether or not the 8,000 sacks that you say were sold was a part of the "Hyades" flour or not you have no knowledge, have you?

160 A. I have no knowledge.

Q. No, no knowledge at all, and you are not able to state

now here, are you, whether or not those 8,000 sacks were paid for or were sold?

A. Well, I would say that up to the time I left there they were not paid for.

Q. Yes, they were not paid for.

A. In fact I am positive, because it was sold through the Comprador or through the general accounts, which would not have been collectible in the—with the general accounts until the first of the following month and with the Chinese just as he collected it in from the Chinese who were sub-contractors building the forts and roads.

Q. Do you know whatever became of the "Hyades" flour?

A. The "Hyades" flour?

Q. Yes.

A. I don't.

Q. Do you know whatever became of a single sack of it?

A. No, nothing other than what I have heard them testify to.

Q. Yes, but of your own knowledge, I mean?

A. No.

Q. You don't know anything about that at all?

A. I know that was in the warehouse of Clarkson & Company.

Q. Whether or not it was ever delivered out of the warehouse to anybody you can't say?

A. I cannot say.

Q. Whether or not the bank ever got any money for the draft you cannot say?

A. No, I cannot say.

Q. Yes.

A. I don't know.

Q. Now, concerning the ship "Pleiades," when did she get into Port Arthur?

A. She got in there on the 7th, I think; I won't be positive to the date.

Q. Of February. You have heard read the deposition here
161 of Mr. Davidson, concerning a certain vessel which got in there, have you not?

A. Well, I heard in reference to two, I think, the boat—do you refer to the boat with the flour?

Q. The boat with the flour.

A. Well, that was about the 7th; it may have been the night of the 6th.

Q. Was Mr. Davidson, in his testimony there, referring to the steamer "Hyades" or the steamer "Pleiades."

A. He was referring to the steamer "Pleiades."

Q. Yes. His testimony had nothing whatever to do, had it, so far as the flour was concerned, with the ship "Hyades," so far as you know?

A. Well, as far as I know. I don't know what his mind was. It is eight years ago and Davidson may have been——

Q. (Interrupting.) The part of his testimony regarding the fact that it was just before the war, that he had to get the assistance of the Russo-Chinese Bank to visit the Admiral so that they could get the boat out of there, and that some of it was landed in go-downs

and on the foreshore—all of those transactions took place with reference to the "Pleiades," didn't they?

A. The "Pleiades," yes.

Q. Now, at the time that the "Hyades" was in Port Arthur there was no war, was there?

A. There was no war.

Q. And there was not any in view, was there?

A. No, we had no thought—we had heard every little while war rumors, but there was absolutely no excitement or no expectation of war on the day of the 7th or the day of the 8th?

Q. Do you know of any reason that on the 30th day of January or the 22nd day of January, 1904, the suspicions of the Russo-Chinese Bank concerning Clarkson should have been aroused more than they were or should have been theretofore?

A. The suspicions of the Russo-Chinese Bank concerning Clarkson, I don't see why there should have been any. Clarkson was in—as far as his Port Arthur branch was concerned was in a better financial standing that it had been for a long time.

162 Q. So far as you know, then, there was no reason why the Russo-Chinese Bank should not have assumed that Clarkson would pay these drafts when they became matured?

A. Absolutely none.

Q. So far as you know, there was no reason that the Russo-Chinese Bank should notify Seattle that there was anything unusual in this transaction, was there?

A. Not that I know of.

Q. Not that you know of?

A. Not that I know of.

Q. And you know of no reason why any custom or usage prevailing at Port Arthur would have compelled the Russo-Chinese Bank to telegraph or write Seattle, do you?

A. No, I don't.

Q. You don't?

A. No. The bank may have had some inkling of war, that I may not have known.

Q. But of course it was known all over the world that there was war imminent, was it not?

A. Well, we knew less about it in Port Arthur than probably anywhere else.

Q. About how large a city was Port Arthur then?

A. There was from forty to fifty thousand Russian troops there; there was probably 4,000 civilians, and anywhere from fifty to a hundred thousand Chinese.

Q. So that there were nearly 200,000 people there?

A. Yes.

Q. It was a large city at that time?

A. It was a large place.

Q. And at that time there was a great deal of business going on, was there not?

A. A great deal of business going *in*.

Q. And there were many ships——

A. (Interrupting.) Well, no, there were not, not just at that time.

Q. Not just at that time, but Port Arthur at that time was a port of very considerable magnitude, was it not?

A. It was.

163 Q. Do you know how many warehouses there were in the city?

A. Well, there was Ginsburg, Clarkson, and the Chinese Eastern Railway Seagoing Service.

Q. How far away were they removed from Clarkson's warehouse?

A. Ginsburg's was about one hundred yards; the Seagoing Service was probably five hundred yards?

Q. Did Clarkson & Company have a separate warehouse for its business as steamboat agent and for its business as importer?

A. No.

Q. They landed the goods, did they, in the same warehouse?

A. In the same warehouse.

Q. And thereupon Clarkson & Company, not as agents of the steamboat, but as importers, or personally made this arrangement that you speak of with the Russo-Chinese Bank?

A. As importers.

Q. As importers?

A. Yes.

Q. Did the question ever come up as to whether or not Clarkson & Company were not responsible as the agents of the steamboat for letting these goods go without a bill of lading?

A. Not to my knowledge?

Q. You never thought or considered that at all?

A. Just give me that question again, will you please?

(Last two questions read).

(Mr. Gregory:)

Q. What is the answer, please?

A. As far as the liability of Clarkson & Company for delivering goods without a bill of lading, that was understood by both Davidson and myself, that if we delivered goods without the consent of the bank, that we were liable to a trip to Sagalin.

Q. What do you mean by that—penitentiary?

A. Well, that it was a criminal offense to take the goods without the consent of the bank.

Q. But you were willing to take, were you, an oral consent without any writing at all?

A. Yes, we were. The bank officials were responsible

164 people.

Q. Yes.

A. And the bank knew at all times that we had sufficient money in sight, or cargo in sight, to cover them.

Q. Did you carry a set of books for Clarkson & Company as agents of the steamship and also for Clarkson & Company as importers?

A. No.

Q. Carried same books?

A. Same books.

Q. Did you make any transfer in your books or any books when you took the flour from the possession of Clarkson & Company, agent of the boat, and transferred it to Clarkson & Company, importers?

A. No.

Q. Nothing of the kind took place upon your books?

A. Nothing at all. The only entries made on the books was that the Centennial Mill Company was credited with the amount of their invoice and when that money was paid into the bank and matured with the draft that money was charged up against that account.

Q. I will call your attention to the fact that Mr. Davidson has testified that this arrangement of which you speak was done upon the acceptance of the draft and by delivery of the documents. Do you agree with him in that respect?

A. Not in all cases.

Q. Not in all cases. It was usual, was it not, to deliver the bills of lading?

A. It was the proper thing to get the bill of lading, I suppose.

Q. Yes. Why didn't you do it in this case?

A. Well, everything at Port Arthur, and particularly at the bank, was done in somewhat of a slack way. You would go to the Russo-Chinese Bank and you would probably find around the man in charge of the drafts—you probably would find that there was fifty or a hundred Chinese there buying drafts or getting drafts, with bills of lading, and you could not wait all day to arrange all those details.

Q. And you were satisfied, were you, with all that hurly burly and people around, to simply get word from the bank official,
165 that that was complete justification for your taking all this flour out of your warehouse and selling it, although you knew that it was secured by a bill of lading; is that so?

A. On the word of the manager of the bank I was perfectly satisfied.

Q. State just what took place between you, just repeat, as nearly as you can, the language between you and the manager of the bank on this occasion?

A. Well, the same as any general occasion—go to him with the draft—go to him and tell him that this draft was there with a bill of lading attached and that you wanted it released and——

Q. (Interrupting.) Did that take place in this case?

A. It took place in all of those cases where the bills of lading were attached to the draft.

Q. Please be specific. Did it take place in the case of the ship "Hyades"?

A. Yes.

Q. You are positive of that, are you?

A. I am positive.

Q. And do you know the exact date?

A. No. I can't tell you to one day; it is a long time back.

Q. And what would the official say—of the bank?

A. What would the official say?
Q. Yes.
A. He would accept the letter of guaranty, and that is all.
Q. Did he write nothing at all?
A. No, nothing was written at all.
Q. He would simply wink his eye or say "All right" or something to that effect.
A. I didn't pay particular attention to that winking of his eye.
Q. But you did know that he said something?
A. Yes.
Q. And that was——
A. (Interrupted.) It was all right and we took the cargo.
Q. And you thought that was all that was necessary?
A. That was all that was necessary. The bank was always aware of the fact that we took the cargo, and up to six months or nine months before Clarkson moved to his own go-down he was
166 taking that cargo out of the bank's go-down and the bank had their own man looking into that warehouse four and five and six times a day, so they knew exactly what was going on.
Q. Was the draft in the bank at the time you went there?
A. The draft in the bank at the time—certainly.
Q. Sure of that?
A. I am positive.
Q. Do you know when the draft got there?
A. The draft got there, if I am not mistaken, a couple of days before the boat.
Q. I call your attention——
A. (Interrupting.) But I am not positive as to that. Very often the draft and bill of lading would arrive in Port Arthur two or three weeks before the steamer, and other cases the steamer would arrive in port before the documents.
Q. You would not go to see the official of the bank, would you, until after the goods had been landed?
A. Not unless we wanted to sell flour off the boat.
Q. Unless you wanted to sell it right off the boat?
A. You see we had to—according to the Russian law I suppose of banking—the drafts were supposed to be accepted within forty-eight hours after arrival.
Q. Yes.

(Mr. McCord:)

A. After arrival of what?
Q. After arrival of the cargo.

(Mr. Gregory:)

Q. You didn't accept this draft, did you, within forty-eight hours after the arrival of the cargo?
A. I can't tell you to a minute or to a day exactly when I accepted it.
Q. You have no specific recollection, have you, of the time when you accepted this draft?
A. No, I should say it was somewhere around or about—running

to the 25th, somewhere around there; I am not positive, I can't be positive.

Q. No. And isn't it a fact, Mr. Short, that your testimony here is based very largely upon your general custom or practice there and not on any specific memory that you have of the special draft of $36,000?

A. No, it is not.

167 Q. You distinctly recall the fact——

A. (Interrupting.) I distinctly recall the steamboat "Hyades" and that of the "Pleiades."

Q. I call your attention to the following statement by Mr. Friedberg: "We categorically deny——"

Mr. McCord (interrupting): Is that in evidence?

Mr. Gregory: No. I am intending to ask him if this statement of Friedberg is correct.

(Mr. Gregory:)

Q. "We categorically deny that the Port Arthur branch ever got a letter of guaranty for the value of the flour which arrived by the steamer 'Hyades,' but the goods and documents, together with the draft for $36,194.80, were from the 31st to 13th April, 1904, in Port Arthur." Is that statement true?

A. No. Let me tell you that Mr. Friedberg was not the manager of the bank and not the man in authority there at that time.

Q. He was there then when?

A. He was in the employ of the Russo-Chinese Bank but he had no authority, or at least I never could get any authority from him.

Q. But the fact is that if Mr. Friedberg did make that statement he is incorrect, is it?

A. Yes, to the best of my knowledge and belief he is.

Q. You are positive about that, are you not?

A. Yes, I am positive about it.

Q. Well, that is what you have been testifying to entirely here.

A. Yes, I am positive.

Q. Sure-gun?

A. I am sure-gun.

Q. I will ask you if you know anything about an arrangement between the bank and Clarkson & Company concerning documents which may have been sent over to Harbin?

A. Concerning documents which might have been sent to Harbin? No, I don't.

Q. You don't?

A. I don't.

Q. Didn't you know or do you know that on account of

168 the conditions in Port Arthur, that the bank had transferred some of its valuables and documents to Harbin?

A. I don't know. The only thing I know is that that Ofsyankin, the manager of the bank, transferred himself to my house when I left.

Q. He did?

A. Yes, to live in my house when I went away.

Q. How long did you remain in Port Arthur?
A. I stayed there—I went away on the "Pleiades," which was—I don't know, somewhere around the 15th.
Q. 15th of February?
A. Yes.
Q. Have you ever been back in Port Arthur?
A. Not yet—not since.
Q. You were there then during the first days of the siege?
A. I was, yes.
Q. And do you know whether or not the bank building was struck by any shells?
A. It was not.
Q. Either of the bank buildings?
A. No.
Q. Do you recall the fact that the bank moved its property from the old bank building down to the new bank building?
A. The bank had not moved up to the time I left.
Q. So that you don't know whether they moved or not?
A. No. I might say that the first bombardment on the day of the 9th a shell struck on the foreshore midway between the Russo-Chinese Bank and Clarkson's warehouse, which shattered all the windows of all the buildings around that part, but there was no shell that struck the bank.
Q. But it was a very hot bombardment, of course?
A. Oh, it sure was. There was no pleasure to be in it.
Q. I agree with you in that respect at least.
A. Well, that is good.
Q. You don't know whether the Japanese confiscated any of this flour that was left in Clarkson's warehouse?
A. No, I don't know.
Q. Isn't it a fact that a part of the flour which was on the "pleiades" was landed there?
169 A. I would say that there was not more than from 1,500 to 2,000 bags landed from that boat.
Q. Is it not a fact——
A. (Interrupting.) And it was not——
Q. (Interrupting.) Was not some of the flour placed upon lighters and these lighters were carried out to sea?
A. It was impossible for lighters to be carried out to sea.
Q. You say that is not true?
A. That is not true; that could not be.
Q. And isn't it a fact also that the Russians confiscated about eight or ten thousand sacks?
A. I don't believe it; in fact I know it; no.
Q. You don't believe that is true at all?
A. No, I don't.
Q. It was then taken over to Dalny, was it?
A. It was taken over to Che-fu.
Q. Did Clarkson & Company have a warehouse there?
A. No.
Q. Didn't they have a warehouse at Che-fu?
A. No sir, not at Che-fu.

Q. Where was it placed at Che-fu?
A. It was put in a warehouse of Cornaby-Eckford & Company.
Q. Did Clarkson & Company have a warehouse at Dalny?
A. They had a warehouse at Dalny.
Q. Did the Russo-Chinese Bank have any agency there?
A. In Dalny, yes.
Q. Also?
A. Also, yes. Mr. —— I would just like to hand Mr. Gregory this letter, if I might, to show that I resigned from Clarkson, and the date (handing paper to counsel.)
Q. That is not a matter I am concerned in.
A. No, but it is just a matter of the date that I pulled out from Clarkson & Company.
Q. Yes sir. Dou recall the fact of Mr. Ostrander being present there in Port Arthur?
A. Ostrander, yes.
Q. You were with him possibly——
A. (Interrupting.) I saw Ostrander there, yes.
170 Q. And he was in and out of your warehouse?
A. He was in and out of the office.
Q. Did he know of this arrangement with the bank?
A. I don't really know. I don't remember.
Q. Didn't he see that you were delivering this flour from time to time?
A. Oh, he could not help but see the flour going out from time to time.
Q. Going out all the time?
A. Yes. I don't remember that Ostrander——

Mr. McCord (interrupting): I object to this as ammaterial, irrelevant and incompetent, and I move to strike out what he has said about Mr. Ostrander.

The Court: I deny the motion.

(Mr. Gregory:)

Q. Continue the answer.
A. (Continuing:) —that Ostrander went into the go-down.
Q. Mr. Ostrander made frequently visits to Port Arthur, did he not?
A. Yes, Ostrander was there on several occasions.
Q. This practice that you speak of had been continuing for some years, had it, regarding the bank and Clarkson & Company?
A. Yes.
Q. Mr. Ostrander must have known, must he not, coming in and going out all the time, about it?
A. Well, I don't know. I never had a great deal to do with Ostrander. He was with Davidson more.
Q. Mr. Ostrander of course knew all about the fact that you were representing the steamboat company?
A. I presume he did. I don't know.
Q. That was a fact well known in Port Arthur, was it not?
A. Yes, it could not help but be known, because——

Q. (Interrupting.) Did you ever have any correspondence with the defendant bank, the bank of Commerce?

A. No sir.

Q. You have had no letters with them at all concerning any of these matters?

A. No, no.

171 Redirect examination.

(Mr. McCord:)

Q. Mr. Short, what became of this letter of guaranty after you signed it on behalf of Clarkson & Company?

A. Well, I don't know. The Bank——

Q. (Interrupting.) Who did you give it to?

A. The manager of the bank, they took it.

Q. Who was Friedberg?

A. Friedberg was—oh, I don't know what you would call him, he——

Q. (Interrupting.) What did he do?

A. Well, he sat around the bank and he signed the drafts—two signatures to a draft—Friedberg with a man named Pavloff.

Q. Was there anybody that had charge of the shipping and arrival of the goods coming over on steamships and so on?

A. There was a man by the name of Neigabaur, I think it was, Neigabaur; that is the man that had charge of the shipping—bank shipping. They very often had a tramp steamer consigned to the bank.

Q. And who was the other manager besides Ofsvankin?

A. Ofsvankin was the manager of the bank.

Q. Well, who was next in authority to him?

A. Well, that would be perhaps Friedberg or Pavloff. Previous to that it was Moss.

Q. Where is Mr. Ofsvankin now?

A. I don't know.

Q. Wasn't there some other man there?

A. Some other manager? There was Mr. Berg, a director of the Russo-Chinese Bank from St. Petersburg, and a Mr. Dard, were both in Port Arthur for—oh, six or nine months trying to straighten up the——

Q. (Interrupting.) When?

A. What?

Q. I say, with reference to the time you left Port Arthur how long had they been there before that?

A. Oh, they had been there for six or eight months, at least Berg had. Dard had been there and gone back.

Q. Was Mr. Berg there when you left?

172 A. I don't remember exactly.

Q. What has become of Ofsvankin now?

A. From somebody's deposition I saw he was manager of the bank in Vladivostok.

Q. He is not one of the witnesses who have testified here?

A. No, he has not testified. He was the manager of the bank and has not testified.

Q. Counsel asked you something about the quantity of flour that was on hand after the arrival of the "Hyades" flour. That was thirty-six thousand and some odd bags, was it not? And you said there were how many then, eight or ten thousand, six or eight thousand?

A. About from six to eight thousand bags; I can't say definitely.

Q. Well then there was forty-two to forty-four thousand sacks in the warehouse?

A. About that.

Q. And you think that at the time you left Port Arthur there had been eight or ten thousand sold?

A. I would figure from eight to ten thousand bags. I can't say definitely.

Q. That still leaves about thirty-two to thirty-four thousand?

A. Somewhere around there, more or less; I can't say.

Q. Now, in regard to the Comprador who bought this flour, how did they make their payments—how frequently?

A. The Comprador, he made his payments to Clarkson & Company as soon as the Chinese sub-contractors on the forts and roads would pay the money to him, which was probably every—some every ten days, some every two weeks, and there was always outstanding twenty to thirty——

Q. (Interrupting.) Were those accounts good?

A. Absolutely good.

Q. I believe in answer to one of Mr. Gregory's questions you stated that when you made the arrangement with the bank you immediately credited the Centennial Mill Company with the amount of the invoice?

A. With the amount of the invoice.

Q. Was that done in this case?

173 A. It was done in every case, that is, up to the——

Q. (Interrupting.) That was done before or after this letter of guaranty was signed?

A. Well, that is done—the invoice is put on file and on the first of the month it was, with other invoices, papers—was credited up to the people from whom we bought goods.

Q. But at the time the letter of guaranty was signed I understood you to say that you had credited the Centennial Mill Company at that time; is that right?

A. Well, within—at the time or within a day or so. Those invoices were received and were credited up to the parties, and then when the drafts were paid the money was charged to them.

Q. Counsel asked you if you were willing to take chances on violating the law without having any written consent. What were your relations with Ofsvankin?

A. Very friendly.

Q. What kind of a man was he?

A. A very, very fine man.

Q. I presume that you thought when they gave you their consent that was all right?

A. I had every confidence in Ofsvankin, and I think he had in us.

Recross-examination.

(Mr. Gregory:)

Q. I desire to ask you, Mr. Short, one or two other questions. I will call your attention to the testimony of Mr. David M. Clarkson, of your firm, in which he says: "Our custom was that the goods should be turned over only on the presentation of the documents." Your testimony differs from that somewhat, does it not?

A. What is that he says, sir?

Q. "Our custom was that the goods should be turned over only on presentation of the documents."

A. I presume he refers there to people who came to Clarkson & Company's office to obtain goods.

Q. Yes.

A. They would have to present the bill of lading or a letter of guaranty, or at least a letter of guaranty by the bank, for
174 the amount, before they would get delivery. These bills of lading were taken up by the shipping clerk in Clarkson's office and at different periods forwarded to different steamship companies as they required these bills of lading.

Q. Do you recall the receipt of a letter dated July 18th, 1903, from Mr. Clarkson, addressed to your firm at Port Arthur, in which he calls attention to the fact that you had been allowing goods to be gotten out of the warehouse without the production of documents?

A. No, I don't. I have studied that and I can't place it at all.

Q. You don't remember anything about that?

A. I don't remember at all.

Q. And you don't remember anything about the fact that he mentions—the case of Guntz & Albers, allowing it to be done?

A. No, I don't. Guntz & Albers is a very large—probably the largest trading house in the Far East.

Q. I call your attention to the fact that Mr. Clarkson says in the letter "Mr. Davidson and Mr. Short both mentioned the fact that as Guntz & Albers gave goods on the firm's letter of guarranty, without the bank's endorsement, they considered they must do the same." You don't recall that?

A. I don't recall that, but I would say that if Guntz & Albers came to me with a letter of guaranty to deliver their bill of lading as soon as they received it, that I would let them have it in those cases, because they——

Q. (Interrupting.) Without any letter from the bank at all?

A. In small amounts.

Q. In small amounts?

A. Yes, because they are very reliable and a very large house.

Q. If any large and reliable house came to you, you would permit them to take goods whether they had the bill of lading or not?

A. If it was a moderately small affair, not a large order.

Q. In other words, the production of these bills of lading
175 was not considered by Clarkson & Company a very essential matter so far as small shipments at least were concerned?
A. Not for a little trifling thing, but with large ones it was.

Redirect examination.

(Mr. McCord:)

You said a while ago that the documents were often kept by the bank. How frequently would you gather up the documents after the drafts had been——

A. (Interrupting.) Well the shipping clerk had charge of that and was supposed to send those bills of lading to the different steamship companies at different intervals, no set time for it.

Q. Did you get more than one at a time?

A. More than one——

Q. (Interrupting.) After you had sold the flour, I say, did you —when the guaranty was signed you said sometimes you left it and sometimes you did not.

A. Well, whenever the draft was paid we always got it.

(Witness excused.)

WILLIAM STEWART DAVIDSON. (Sworn by American Consul-General at Shanghai, China.)

Interrogatory No. 1:

Q. What is your name?

A. William Stewart Davidson.

Interrogatory No. 2:

Q. Where do you reside?

A. In the city of Shanghai, China, at No. 10 Canton Road.

Interrogatory No. 3:

Q. What is your occupation?

A. I am a director in the firm of J. A. Wattie & Company, Limited.

Interrogatory No. 4:

Q. How long have you resided in Shanghai?

A. Since 1904.

Interrogatory No. 5:

Q. Where did you reside during the year 1903?

A. During the year 1903 I resided at Port Arthur, North China.

176 Interrogatory No. 6:

Q. What was your business during that time?

A. I was manager of the firm of Clarkson & Company.

Interrogatory No. 7:

Q. How long did you occupy that position?
A. From April, 1900.

Interrogatory No. 8:

Q. What power of attorney did you have as manager?
A. I had the fullest power of attorney that was possible to give under Russian law.

Interrogatory No. 9:

Q. This power of attorney was renewed each year?
A. Yes, sir; each year.

Interrogatory No. 10:

Q. What was the nature of the business of Clarkson & Company?
A. They were importers, stevedores, commission agents, shipping agents and agents of fire insurance companies. They did a general business of that character.

Interrogatory No. 11:

Q. Did Clarkson & Company control any warehouses in Port Arthur?
A. Clarkson & Company owned two warehouses in Port Arthur.

Interrogatory No. 12:

Q. Who were the agents at Port Arthur for the Boston Steamship Company and the Boston Towboat Company?
A. Clarkson & Company.

Interrogatory No. 13:

Q. With whom did Clarkson & Company do their banking business in Port Arthur?
A. The Russo-Chinese Bank.

Interrogatory No. 14:

Q. What was the volume of the business of Clarkson & Company with the Russo-Chinese Bank?
A. Well, it is impossible for me to give exact figures. The only thing I can say is that they operated on an extensive basis.

177 Interrogatory No. 15:

Q. How long have you lived in the Orient?
A. Over fourteen years.

Interrogatory No. 16:

Q. Before taking charge of Clarkson & Company's business in Port Arthur, where did you reside in the Orient?
A. Immediately before I went to Port Arthur I lived in Vladivostok, and previous to that in Yokohama.

Interrogatory No. 17:

Q. How long were you in Vladivostok and what was your business there?

A. I went to Vladivostok as a permanent resident. I arrived in Vladivostok and immediately took up a permanent residence on the 4th of July, 1898, and joined the firm of Clarkson & Company as manager of the engineering department and remained in that position until September, 1899, when I went on a trip to Europe and America for Clarkson & Company, and returned to Vladivostok March, 1900, when I was asked by the head of the firm to take charge of the office in Port Arthur for a few months.

Interrogatory No. 18:

Q. In what capacity?

A. As manager of the engineering department of Clarkson & Company.

Interrogatory No. 19:

Q. Are you familiar with the customs and methods of bankers in dealing with importers in the Orient?

A. Yes sir.

Interrogatory No. 20:

Q. What is the custom of bankers with reference to presenting drafts for acceptance?"

Mr. Gregory: Now, may it please the court, we desire to object to that question as incompetent, irrelevant and immaterial, upon two grounds: First, that there is no reason for the court to now invoke any custom or usage, because the contract in this case is clear and specific and direct; in other words, there is no necessity for an implied contract, because there is an express one; and upon
178 the second ground that the question does not refer to the conditions prevailing in this case, because it does not ask with reference to presenting drafts for acceptance which are sent as against payment, but it asks generally as to drafts for acceptance. Now, of course there may be one custom of bankers concerning one sort of a draft and another concerning the other kind of a draft, but to invoke now a custom generally and say that it applies to this case is, we submit, utterly incompetent, irrelevant and immaterial.

The Court: I overrule the objection.

Mr. Gregory: Note an exception.

The Court: Exception allowed.

A. As soon as the bank receives the draft it is customary for them to request the drawee to accept it, either by asking the drawee to come to the bank or sending it around to his office.

Interrogatory No. 21:

Q. What is the established custom among bankers at Oriental ports with reference to the handling of drafts with bills of lading and documents attached, when the drafts are in their hands for collection?"

Mr. Gregory: Your Honor will allow me the same objection as that made to the previous one, and the third point that it is not pleaded in the pleadings.

The Court: The objection is overruled.

Mr. Gregory: Exception.

The Court: Exception allowed.

"A. The established custom among bankers in the Orient is not to part with the documents until the drafts have been paid, if the documents are only deliverable against payment. It often happens, however, that the firm upon which the draft is drawn has a good credit with the bank and under those circumstances the bank delivers the documents against acceptance and thereby accepts responsibility."

Mr. Gregory: We ask that last portion of the answer, to-wit, beginning with "It often happens" go out, as not responsive to the question.

The Court: The motion is denied.

Mr. Gregory: Note an exception.

The Court: Exception allowed.

179 "Interrogatory No. 22:

Q. What is the custom of the Russo-Chinese Bank upon the arrival of shipments w-ere drafts with bills of lading *are* attached are in their hands for collection?"

Mr. Gregory: We object to any evidence of this custom on the grounds previously stated and upon the further ground that there is no pleading whatever here concerning this matter, therefore it is incompetent, irrelevant and immaterial. There is no statement in the question as to the character of the draft referred to, whether it was a draft as against acceptance or whether it was a draft as against payment. For example, the question is this, Your Honor: "What is the custom of the Russo-Chinese Bank upon the arrival of shipments where drafts with bills of lading *are* attached are in their hands for collection?" Now there are two kinds of drafts. One is a draft which authorizes them to turn the bill of lading over when it is accepted; that is one thing. The other is where the draft says they shall retain the bills of lading until it is paid; that is another thing. But now this question is asked and the answer is made as if it were a general statement.

The Court: I allowed Mr. Spencer to testify about custom. The word "custom" is confusing as a legal term, because in law a custom is a species of law. I would not have allowed Mr. Spencer to be interrogated about special customs that take the place of statutes unless it was a custom that was pleaded. I understand these questions to be in the same line as the testimony of Mr. Spencer, to enlighten the jury as to the course of business—the ordinary course of business, not to change the rights of the parties by a peculiar custom that changes the law, but simply to show the jury what the usual and ordinary course of business is. Being across the water,

they may have practices there that would be unusual here, and whatever the practice is I think we are entitled to know by the testimony of witnesses who can tell us.

Mr. Gregory: I do not want to seem unduly insistent, Your Honor, and therefore I shall not further take up the time of the court and jury with this matter, because we have our exception, but I simply wish to again assert that I don't think that counsel can find
180 any authority which says that where there is a precise contract expressed as there was here, that custom of usage can ever be invoked, when that contract is not ambiguous. That is my understanding of the law.

The Court: I will give an instruction like that to the jury in this case.

Mr. Gregory: Then, if Your Honor please, if that is so, and the contract in this case is not ambiguous but is precise, the testimony is not admissible.

The Court: It may go in as a part of the res gestæ—of the circumstances of the transaction.

Mr. Gregory: Note an exception.

The Court: Exception allowed.

"A. The custom of the Russo-Chinese Bank at Port Arthur was to see that the cargo was stored and insured and the managers of the Russo-Chinese Bank have frequently come to the office of Clarkson & Company to ascertain if certain cargo was properly stored and have taken out fire insurance with some of the fire insurance companies for which Clarkson & Company acted as agents, on such cargo."

Mr. Gregory: We ask now, first, that the answer go out as incompetent, irrelevant and immaterial—the entire answer, and then we specifically ask that that portion of the answer which begins with the words "and the managers of the Russo-Chinese Bank have frequently come to the office of Clarkson & Company" down to the end of the sentence be stricken out as not responsive to the question and as being no evidence of a custom.

Mr. McCord: It is clearly responsive to the question.

The Court: The motion to strike is denied.

Mr. Gregory: We note an exception.

"Interrogatory No. 23:

Q. In transactions taking place between the firm of Clarkson & Company at Port Arthur and the branch of the Russo-Chinese Bank at Port Arthur, were these customs strictly observed?"

Mr. Gregory: May it please the court, we have an additional objection to make to this question. We object to it upon the same grounds as previously made and upon this additional ground.
181 that there is no pleading whatever here to the effect that there was a practice between these parties to disregard the other custom, and, furthermore, that the matter is absurd upon the face of it because they now allege in one place that the custom was

not to part with the goods until they were paid, and now proceeds to state that the practice was to do that thing. Now, just as soon as you have the practice the custom ceases. In other words, it could not be the custom between the parties when they continually violate it, the two matters cannot stand together. The question, therefore, Your Honor, is this way, they first of all ask what the general custom is; that is answered, and then says "What was the practice?" He says this was directly opposite to the custom, therefore it negatives the custom, one fights the other. You can't have two customs antagonistic existing at the same time. Now we feel, very strongly, Your Honor, that this is utterly irrelevant and incompetent, but I assume Your Honor will rule the same as before.

The Court: You may as well argue to me that if the witness says one thing and then contradicts it that he should not be allowed to say it. Now it is for the jury to consider your argument here that one statement contradicts the other.

Mr. Gregory: No, Your Honor, perhaps I didn't make my point clear.

The Court: Yes, I think you did.

Mr. Gregory: What the witness has said is this, not that he is mistaken at all, but he first said "this was the custom" and then in the next breath he says "the practice was this." How can those two things stand together?

Mr. McCord: That is for the jury.

Mr. Gregory: No, it is a question of law, Your Honor.

The Court: The jury will handle it, probably.

Mr. Gregory: Well, of course I understand that is Your Honor's decision. I am simply getting my record straight here, Your Honor.

The Court: Yes sir, exception allowed.

"A. These customs were not strictly observed as the Russo-Chinese Bank at Port Arthur allowed Clarkson & Company to have the bills of lading and other documents attached to the draft before
182 the draft was paid. This only happened I might say when the amount involved was a considerable amount such as would be the case in flour shipments."

Mr. Gregory: Now we ask that after the word "allowed" to the end of the sentence be struck out as not responsive to the question, and further that it is incompetent, irrelevant and immaterial and not pleaded and being no evidence of a custom or usage.

The Court: The motion is denied.

Mr. Gregory: Exception.

The Court: Exception allowed.

"Interrogatory No. 24:

Q. Why would the bank permit this to be done by Clarkson & Company?

Mr. Gregory: We object to this question as incompetent, irrelevant and immaterial and cross-examination of his own witness. His

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witness has stated this fact and he is not obliged to cross-examine him to state why it is so.

The Court: Objection overruled.

Mr. Gregory: Note an exception.

"A. Because the firm of Clarkson & Company was established at the instigation and with the assistance of the Russo-Chinese Bank in Vladivostok in 1897. Mr. Clarkson went to Vladivostok about that time and then *then* managers of the Russo-Chinese Bank at Vladivostok requested him to establish what they called an American firm and the Russo-Chinese Bank found him a Russian partner. Neither Mr. Clarkson or his Russian partner put one cent of capital into the firm. Notwithstanding this the Russo-Chinese Bank opened credits for the firm of Clarkson & Company for a sum of over a million roubles. Towards the end of the year 1898 when the firm of Clarkson & Company had been established one year, roughly speaking, Mr. Clarkson was absent from Vladivostok and I was in charge when the bank, the Russo-Chinese Bank, presented a statement of accounts showing that the firm of Clarkson & Company owed the Russo-Chinese Bank approximately eight hundred thousand roubles. I thereupon looked into matters and particularly the accounting department, with which I had not concerned myself previously, and found that there was absolutely no books
183 showing what credits had been opened or what sums had been drawn against any particular credit. In other words, there was no means of refuting or corroborating the statement presented by the Russo-Chinese Bank so I could do nothing. Upon Mr. Clarkson's return from Port Arthur the matter was gone into and rather than employ the services of a chartered accountant to go over the books and the transaction in detail, he preferred to accept liability according to the Russo-Chinese Bank's statement for this eight hundred thousand roubles. There were goods in hand representing a value of approximately three hundred to four hundred thousand roubles and therefore there had been a loss on the first year's business of between three hundred and four hundred thousand roubles. Clarkson & Company continued to owe the Russo-Chinese Bank this hugh sum for many years and it was on account of this debit balance that the bank, the Russo-Chinese Bank, afforded these special facilities for doing business to Clarkson & Company.

Mr. Gregory: We ask that all the portions of that answer following the words "Mr. Clarkson went to Vladivostok" be struck out as not responsive to the question, and, furthermore, that all those portions which pretend to give a history of the bank balance between the two institutions be struck out as not responsive.

The Court: The motion to strike is denied.

Mr. Gregory: Note an exception.

"Interrogatory No. 25:

Q. When Clarkson & Company were allowed to take delivery of the cargo under the circumstances you have described, who held the bills of lading?

A. The custom was for the bank, the Russo-Chinese Bank, to deliver the bills of lading to Clarkson & Company when Clarkson & Company accepted the draft.

Interrogatory No. 26:

Q. For how long was this practice kept up?
A. This custom was in practice from the time I took charge of the firm of Clarkson & Company in Port Arthur until I left.

Interrogatory No. 27:

Q. Were there any other banks in Port Arthur?
184 A. No, but the Hongkong & Shanghai Banking Corporation had an agency in Port Arthur.

Interrogatory No. 28:

Q. What was their practice in matters of this kind?
A. To my knowledge they never allowed the bills of lading to be surrendered until the draft had been met.

Interrogatory No. 29:

Q. Had the firm of Clarkson & Company at Port Arthur had any business transactions with the Centennial Mill Company at Seattle, Washington?
A. Yes, sir.

Interrogatory No. 30:

Q. What was the nature of them?
A. Clarkson & Company had bought large quantities of flour from the Centennial Mill Company at Seattle, Washington.

Interrogatory No. 31:

Q. How was the payment for this flour made?
A. The Centennial Mill Company drew on Clarkson & Company a ninety day sight draft for the value of shipment with the bill of lading and insurance policy attached to the draft which was to be surrendered against payment.

Interrogatory No. 32:

Q. What was the practice of the Russo-Chinese Bank at Port Arthur in dealing with Clarkson & Company in reference to these shipments from the Centennial Mill Company?"

Mr. Gregory: I make the same objection as to the practice as heretofore made, Your Honor.
The Court: Objection overruled.
Mr. Gregory: Exception.
The Court: Exception allowed.

"A. The Russo-Chinese Bank invariably during my connection with the firm of Clarkson & Company surrendered the bills of lading and other shipping documents on acceptance of the draft. Afterwards upon the sale of flour by Clarkson & Company the proceeds

of such sales were put into the Russo-Chinese Bank and when the sums so paid in were large enough it was customary to ask
185 the bank to telegraph the equivalent of these sums in American currency to America in order to avoid further interest charges."

Interrogatory No. 33:

Q. State fully and in detail the custom between Clarkson & Company and the Russo-Chinese Bank with reference to the handling of flour covered by documents held by the bank?"

Mr. Gregory: We object to this question as incompetent, irrelevant and immaterial, there being no ground shown for the introduction of the custom, and the witness not having been shown to have had any personal knowledge whatever of the particular transaction involved.

The Court: The objection is overruled.

Mr. Gregory: Exception.

"And state whether or not the Russo-Chinese Bank consented to the sale of the flour on the "Hyades" by Clarkson & Company prior to the payment of the drafts?"

Mr. Gregory: Same objection. I should have made it at the end of the question.

The Court: You will have an exception to my ruling overruling any objection to this line of questions.

"A. As soon as the draft reached the Russo-Chinese Bank it was customary for the Russo-Chinese Bank to inform Clarkson & Company of its arrival and then this notification was given by a request from the bank that it should be accepted. The draft usually arrived some time before the goods and it was usual to accept it before the steamer carrying the goods had arrived in port. Upon the arrival of the steamer carrying the goods in port some one in authority from Clarkson & Company would go to the Russo-Chinese Bank and make arrangements to get the documents attached to the draft upon acceptance of the draft and invariably this was accomplished. The Russo-Chinese Bank when surrendering documents before the draft was paid required that a letter of hypothication should be signed by Clarkson & Company. I have no copy nor original of such letter nor do I know where one can be found as all such letters were delivered to the bank, Russo-Chinese Bank, at the time they were signed but I do know that in substance these letters
186 stated that the goods belonged to the Russo-Chinese Bank and that the consignee agreed to pay to the Russo-Chinese Bank the proceeds of all sales when and as made? On or about the 15th day of February, 1904, the Russo-Chinese Bank did consent to the sale of the flour ex steamship "Hyades," if that is the name of the steamer that arrived at Port Arthur on or about the 8th of February, 1904."

Mr. Gregory: We ask now that that portion of the answer com-

mencing with the words "On or about the 15th of February, 1904, the Russo-Chinese Bank did consent to the sale of the flour ex steamship 'Hyades,' if that is the name of the steamer that arrived at Port Arthur on or about the 8th of February, 1904,"—that that portion of the answer be stricken as not responsive to the question, and, furthermore, that it now appears that this witness does not refer to the steamer "Hyades" at all, which arrived at Port Arthur on January 17th, but to the "Pleiades" which arrived there on February 8th.

Mr. McCord: I think the testimony of the witness further on, Your Honor, explains that he had reference to the "Hyades" flour. I think that will be a question for the jury to pass upon. I say to the court that in my judgment that is what it will show.

The Court: The objection is overruled. The jury will understand, however, that this testimony is not relevant unless it is connected up to show the witness was talking about the "Hyades" and not the "Pleiades."

Mr. Gregory: We will take a formal objection and exception.

The Court: Exception allowed.

"Interrogatory No. 34:

Q. And if you answer that the Russo-Chinese Bank did consent to the sale of the flour included in this "Hyades" shipment prior to the payment of the draft, state how this consent was manifested. Did the Russo-Chinese Bank at the time it gave its consent to the sale of this flour require Clarkson & Company to execute any written instrument recognizing the bank's ownership of the flour and agreeing to account to the Russo-Chinese Bank for the proceeds of the sale of the flour?

A. On or about the 15th of February, 1904, I personally notified the at that time manager of the Port Arthur branch of
187 the Russo-Chinese Bank that I could not get in communication by telegraph with the head office of Clarkson & Company; that I had been ordered to leave Port Arthur by the Russian military authorities and that for these two reasons and as there was no one there I could leave in charge of the affairs of Clarkson & Company I had made arrangements with a Russian firm by the name of Ginsburg & Company to take over the flour and pay the draft, to which arrangement the Russo-Chinese Bank consented, and as I left Port Arthur on the 17th of February, 1904, I do not know whether the bank required Ginsburg & Company to sign a letter of hypothication but assume that they did not in as much as they had doubtless obtained one previously from Clarkson & Company."

Mr. Gregory: We ask that that portion of the answer as follows: "but assume that they did not in as much as they had doubtless obtained one previously from Clarkson & Company" be struck out as hearsay.

The Court: Strike it out.

Mr. McCord: No objection.

The Court: The jury will understand that that item of evidence has been ruled out by the court.

"Interrogatory No. 35:

Q. If you answer that there was a written document required by the bank to be executed by Clarkson & Company, attach to your deposition a copy of such document, if you have one, and if you have not such a copy, then state, if you know, where such a copy of the original document can be found?

A. I have not a copy of the letter of hypothication nor do I know where one can be obtained. These letters of hypothication were always handed to the bank.

Interrogatory No. 36:

Q. If you have not in your possession or under your control any of the duplicate, originals or copies of documents signed by Clarkson & Company to the bank, permitting Clarkson & Company to sell the flour included in this 'Hyades' shipment prior to the payment of the draft, state the contents of such written instrument fully, give the substance of the agreement that the bank exacted from Clark-
188 son & Company when the bank gave its consent to Clarkson & Company to sell said flour and to account to the bank for the proceeds thereof?

A. I have no original, duplicate original nor copy of such instrument of hypothication given to the Russo-Chinese Bank by Clarkson & Company and it is impossible for me to remember the exact wording of such letters in use by the bank at that time as nearly eight years have elapsed, but in substance it stated what I have already stated.

Interrogatory No. 37:

Q. If you state that there was such a custom requiring a written instrument to be executed by Clarkson & Company to the bank, state how long this custom had been in force and whether the transaction covering the shipment of the Centennial Mill Company on the 'Hyades' was covered by such custom? In other words, did Clarkson & Company execute such written instrument in case of the shipment in question as in other cases to which you have referred in your deposition?"

Mr. Gregory: Generally, we object, Your Honor, upon the same ground as heretofore stated, that there is no room here for custom or practice.

The Court: The objection is overruled.

Mr. Gregory: Exception.

"A. To the best of my recollection this custom was instituted and inaugurated towards the end of the year 1901 or at the beginning of 1902. It is impossible for me to say positively that the Russo-Chinese Bank required such an instrument for the shipment in question. All that I can say is that it was the custom for the Russo-

Chinese Bank to demand such an instrument for all shipments arriving under similar circumstances.

Interrogatory No. 38:

Q. When did the last shipment of flour from the Centennial Mill Company to Clarkson & Company arrive at Port Arthur?

A. The last shipment of flour from the Centennial Mill Company to Clarkson & Company at Port Arthur arrived at that port on or about the 8th of February, 1904, but I cannot say positively that I have got the exact date as I was absent from Port Arthur at the time it arrived.

189 Interrogatory No. 39:

Q. Where had you been?

A. Tientsin.

Interrogatory No. 40:

Q. On what steamer was this flour brought to Port Arthur?

A. On one of the steamers operated by the Boston Steamship Company or the Boston Towboat Company. Either the 'Hyades' or the 'Pleiades.'

Interrogatory No. 41:

Q. Who were the agents for these steamers?

A. Clarkson & Company.

Interrogatory No. 42:

Q. What was the quantity of flour shipped by this steamer for Clarkson & Company from the Centennial Mill Company?

A. Between thirty-five and forty thousand sacks.

Interrogatory No. 43:

Q. Where was this flour when you arrived?

A. Some of it was in the go-downs of Clarkson & Company; some of it was on the foreshore; some of it was still in the lighters, and it is possible that there may have been some of it still undischarged from the steamer.

Interrogatory No. 44:

Q. Who were the stevedores?

A. Clarkson & Company.

Interrogatory No. 45:

Q. What did you do upon arrival at Port Arthur in reference to this shipment of flour?

Mr. Gregory: I think I ought to object here, may it please Your Honor. It appears now conclusively in this case that this witness is talking entirely about the "Pleiades," because he says he don't know whether it was the "Hyades" or the "Pleiades," but it was the boat that arrived there about February 8th, 1904.

Mr. McCord: Yes, but he said it was the one that brought thirty-

five or forty thousand sacks of flour, the exact amount of flour——

190 Mr. Dorr (interrupting): In every instance he has limited it to the boat that arrived there in February.

Mr. Gregory: February 8th, 1904.

The Court: There is a discrepancy in the testimony. It is the business of those twelve men to deal with discrepancies in the testimony.

Mr. Gregory: Where is the discrepancy?

The Court: Mr. McCord just stated it, my ears heard it.

Mr. Gregory: I think the evidence shows, without any question at all, that the witness said——

The Court (interrupting): He said the "Hyades" or the "Pleiades" took thirty-five or forty thousand sacks of flour there.

Mr. Gregory: Yes, we are going to show that this entire testimony and all of this Ginsburg transaction has nothing to do with the "Hyades," it was the "Pleiades."

The Court: You can show that if you have got the evidence.

Mr. McCord: It is for the jury to pass on that question.

Mr. Gregory: I will ask you now, Mr. McCord, do you claim that the steamer that Davidson is talking about arriving there February 8th, 1904, was the steamer "Hyades"?

Mr. McCord: I claim it was the "Hyades," the steamer that carried the thirty-five or forty thousand sacks of flour. The "Pleiades," which arrived there in February and which left on the 13th of February, never unloaded any flour at Port Arthur except about a thousand sacks.

Mr. Gregory: You claim then, do you, that the steamer "Hyades" was unloading at Port Arthur on February 8th, 1904?

Mr. McCord: No, I don't claim that she was.

Mr. Gregory: What do you claim as to which boat this was?

The Court: I overrule your objection. Go on.

Mr. Gregory: You claim it was the "Hyades"?

Mr. McCord: Yes sir, I claim it was the "Hyades" that he is talking about here.

Mr. Gregory: Very well.

"A. I was allowed to go on shore at Port Arthur between four and five o'clock in the afternoon of the 9th of February, 1904,
191 and immediately upon my arrival on shore I went to the office of Clarkson & Company and there discovered that the most of my assistants were hiding in their homes and some of them had already ran away to Vladivostok. I was besieged by people who were anxious to get passage away from Port Arthur by the steamers for which Clarkson & Company acted as agents and as soon as I had pacified them and told them there was no possibility of any steamer leaving Port Arthur I looked for the compradore and after a certain time, possibly an hour or more, succeeded in finding him and I then tried to make arrangements with the military and naval authorities to supply watchmen to guard the cargo as all of the employes of Clarkson & Company were absolutely worthless for that purpose. Neither the navy or any army departments would give

me any assistance. I finally found two Russian civilians whom I engaged for that purpose. I want to state right here that I saw with my own eyes that afternoon a very considerable quantity of flour being stolen which it was impossible for me to prevent. The whole town was in a chaotic state and the people were, more particularly the Chinese, looting everything in sight.

Interrogatory No. 46:

Q. Where were the bills of lading for this shipment of flour?

A. I do not know. I have no definite knowledge myself, but I presume that the usual custom had been followed and they had been surrendered to Clarkson & Company at the time the draft was accepted."

Mr. Gregory: We ask that the answer commencing with the words "I presume that the usual custom had been followed" be stricken.

Mr. McCord: I do not object to it being stricken—that part of it.

The Court: Strike it out. It is a matter of no importance whatever.

Interrogatory No. 47:

Q. Do you know who accepted the draft or whether it was accepted?

192 A. I do not but it could have been accepted by either myself or Mr. Czechowitz who acted as cashier for the firm of Clarkson & Company and had power to accept drafts, or by Mr. Short previous to his leaving the firm.

Interrogatory No. 48:

Q. State whether or not Clarkson & Company disposed of any part of that shipment of flour?

A. Clarkson & Company entered into an agreement with Ginsburg & Company to sell part of this flour, the actual quantity to be determined when delivery was taken.

Interrogatory No. 49:

Q. What were the terms of sale?

A. I cannot remember the exact figures but Ginsburg & Company paid me a certain amount per sack, and the balance, sufficient to meet the draft, was to be paid when the flour was counted. Ginsburg & Company were unable to pay the full value of the flour at that time for the very good reason that the bank being short of funds simply closed its doors and stopped doing business and consequently Ginsburg & Company could not get the money with which *the* meet payments.

Interrogatory No. 50:

Q. Who were Ginsburg & Company?

A. Ginsburg & Company was a very large Russian firm which did a very extensive business with the army and navy department of the Russian Government as well as with the Chinese Eastern Railway Company. The head office of the firm was in Port Arthur and the

arrangement I made above referred to in previous answer concerning sale of flour to Ginsburg & Company was with Mr. Ginsburg, the head of the firm of Ginsburg & Company, personally.

Interrogatory No. 51:

Q. Who negotiated this sale on behalf of Clarkson & Company?
A. I did.

Interrogatory No. 52:

Q. What were the terms as to delivery?
A. There were no particular terms. Ginsburg & Company were handed the keys of the warehouse by me and they agreed
193 to make payment to the Russo-Chinese Bank against the particular draft as soon as they had counted the flour and as soon as the bank was put in funds.

Interrogatory No. 53:

Q. Why did you make this sale?
A. Because as a British subject I was ordered to leave Port Arthur within twenty-four hours on the 10th of February, 1904. Notwithstanding this order to leave I remained in Port Arthur in order to fix up the best I could and to the fullest extent the affairs of Clarkson & Company and I remained there by myself in Port Arthur until the 17th day of February, 1904. During these seven days from the 10th of February to the 17th of February, 1904, I endeavored my utmost to get in communication by telegraph with the head office at Vladivostok but without success. It was impossible for me to delay my departure any longer as other British subjects had been arrested for not leaving when told to do so. There was no one there I could leave in charge of the affairs of Clarkson & Company and the only thing I could do was to close up the offices and endeavor to reach some place from where I could communicate with the head office. I therefore sold the flour at a price which enabled Clarkson & Company to make a reasonable profit, for which approximate profit Ginsburg & Company gave me a draft on Shanghai and the balance of the proceeds of the sale was to be paid by Ginsburg & Company into the bank, the Russo-Chinese Bank, against the draft for the Centennial Mill Company. This arrangement was made known to the Russo-Chinese Bank by me and I believe Mr. Ginsburg accompanied me to the Russo-Chinese Bank when I acquainted them with the terms of this arrangement.

Interrogatory No. 54:

Q. Was the Russo-Chinese Bank cognizant of the transaction?
A. Yes, sir; they were.

Interrogatory No. 55:

Q. Did they make any objection to this sale?
A. No objections were raised, presumably for the reason that Ginsburg & Company had a large, open credit with the Russo-
194 Chinese Bank, much larger than Clarkson & Company had."

Mr. Gregory: I ask that that portion of the answer commencing with the word "presumably" be stricken out as not responsive.

The Court: Strike it out.

Mr. McCord: No objections.

"Interrogatory No. 56:

Q. Do you know whether this draft drawn by the Centennial Mill Company and in the hands of the branch of the Russo-Chinese Bank at Port Arthur covering this shipment of flour was ever actually paid?

A. No; I have no knowledge, definite knowledge, that it ever was paid since I left Port Arthur long before it fell due."

Mr. Gregory: I object to the remaining part of this answer which is explanatory, because he has already stated he does not know anything about it.

Mr. McCord: Well, he said "if it was not paid"——

Mr. Gregory: He says it was the fault of the bank. How does he know anything about it?

Mr. McCord: The burden is on you, it seems to me, to prove that fact too.

Mr. Gregory: If you want to stand by that, I am willing to take my exception.

Mr. McCord: I am wiling you should take it, sir.

Mr. Gregory: Very well.

The Court: I will rule out any statement he makes that is not a statement of a fact within his knowledge, any argument or reasons why he thinks something should have happened.

Mr. McCord: I do not think this falls within Your Honor's conclusion, but I will read it and let you see. I don't want to be unfair with the jury, "but if it was not paid by Ginsburg & Company then it was the fault of the Russo-Chinese Bank because the firm of Ginsburg & Company to my definite knowledge have ever since been able to pay this draft and if for any reason the arrangement I made with Ginsburg & Company was avoided or not carried out
195 then the Russo-Chinese Bank had it within their right and power to demand the surrender of the keys to the warehouse from Ginsburg & Company."

The Court: I overrule the objection, or the motion to strike.

Mr. Gregory: Note an exception.

"Interrogatory No. 57:

Q. When you say you notified the bank what do you mean?

A. I mean that I notified one of the two managers of the Russo-Chinese Bank.

Interrogatory No. 58:

Q. Do you know whether or not the Russo-Chinese Bank ever made use of general warehouses for the storage of merchandise covered by bills of lading attached to drafts in their hands for collection?

A. Frequently use was made by the Russo-Chinese Bank of gen-

eral warehouses for goods for which they held the bills of lading attached to drafts drawn on merchants in Port Arthur.

Cross-Interrogatories.

Cross-interrogatory No. 1:

Q. Are you connected with the firm of Clarkson & Company? If so, in what capacity?

A. Thank God, I am not.

Cross-interrogatory No. 2:

Q. Was A. T. Short associate manager with you of the business of Clarkson & Company at Port Arthur?

A. Yes sir; as assistant manager or associate manager.

Cross-interrogatory No. 3:

Q. Was not Short discharged in the latter part of 1903?

A. Short disassociated himself from the firm at the end of December, 1903, to the best of my recollection.

Cross-interrogatory No. 4:

Q. Were you not discharged as manager of the business of Clarkson & Company early in 1904?

A. No; positively not. On the 18th of January, 1904, I wrote a letter to Mr. Clarkson in Vladivostok, the head of the firm, in which I refused to comply with certain conditions he had laid down in a letter addressed to me and dated the 12th of January, 1904,
196 and told him unless he withdrew these conditions I would get out. On the 23rd of January, 1904, he wrote me a letter in reply to mine of the 18th in which he requested me to reconsider my decision. This letter of the 23rd of January, 1904, reached me on the 29th of January, 1904, at a time when I was extremely busy. I had no opportunity of replying in detail but I did write to him on the 1st of February, 1904, acknowledging receipt of his letter of the 23rd of January and telling him that I hoped to be able to answer it very soon. On the 2nd of February, 1904, owing to having received an order for something like fifty thousand tons of coal for the Chinese Eastern Railway Company, I proceeded to Chinwantau on the steamer 'Girin' and arrived at Tientsin on the 4th of February, 1904. I think it is necessary for me here to state that the innovation to which I objected was that I was to have a co-manager and in the future all documents and papers were to be signed by two people on behalf of the firm of Clarkson & Company. * * * Mr. Czechowitz and myself, as I had been the manager of the firm of Clarkson & Company for upwards of four years, during which time I had made for the firm of Clarkson & Company approximately five hundred thousand roubles, practically all of which had been withdrawn for the purpose of financing some of Mr. Clarkson's hair-brain schemes at Vladivostok and I resented any such in-ovation. I left Chinwantau after having made arrangements with the Chinese Engineering & Mining Company to supply the fifty thousand tons of

coal at eleven o'clock P. M. on the 8th of February, 1904. I arrived off of Port Arthur the following morning about ten o'clock. I was on a Russian steamer named 'Ninguta' which was denied admission and denied entrance into the inner harbor. The result of which was I was compelled to remain on board this steamer which was anchored between the Russian and Japanese fleets while the latter bombarded the former for about one hour. Sometime after this the 'Ninguta' was allowed to enter but I was denied permission to go ashore. On my arrival on the shore between four and five o'clock in the afternoon I was informed that Mr. Czechowitz left for Vladivostok by the first train after the bombardment began with the Russian
197 bookkeeper who had taken Mr. Short's place. The only other office man was a youngster by the name of Newhard and owing to his youth and utter incapacity and the fact that he was then in jail he was unable to render any assistance to me. From what I have since learned it would appear that Clarkson addressed a letter to me on the 30th of January, 1904, which letter he sent to Mr. Czechowitz at Port Arthur and which letter arrived during my absence in Tientsin. This letter notified me that Mr. Clarkson had made Mr. Czechowitz sole manager of the Port Arthur office and asked me to turn over all of the company's business to Mr. Czechowitz and agreed to pay me one month's salary after seven years' work. Mr. Czechowitz, however, it appears was too much concerned with his own safety to remain in Port Arthur to hand this letter over to me and I not knowing of its existence undertook and did my best to protect the interests of the firm of Clarkson & Company during the eight trying days thereafter that I remained in that besieged port. Ultimately being compelled to leave I arrived in Shanghai about the 28th of February, 1904, and on the 29th of the same month, the next day after my arrival, was presented by Mr. A. C. Hunter of Shanghai with the letter from Clarkson dated the 30th of January, 1904. The original of this letter I have now shown the commissioner and ask that it be attached to and made a part of my deposition and marked exhibit A. It is dated Jan. 17/30/1904.'

Cross-interrogatory No. 5:

Q. What was the precise date of your discharge as such manager?
A. I would refer you for answer to this cross-interrogatory to my answer given to cross-interrogatory No. 4.

Cross-interrogatory No. 6:

Q. Was it not prior to February 9/22nd?
A. I left Port Arthur on the 17th of February, 1904.

Cross-interrogatory No. 7:

Q. What was the cause of your discharge as such manager?
A. I would refer you for answer to this cross-interrogatory to my answer to cross-interrogatory No. 4.

198 Cross-interrogatory No. 8:

Q Did not Mr. Czechowitz succeed you as manager of the business of Clarkson & Company at Port Arthur?

A. I would refer you for answer to this cross-interrogatory to my answer to cross-interrogatoy No. 4.

Cross-interrogatory No. 9:

Q. After your discharge as manager of the business of Clarkson & Company at Port Arthur what connection with that business did you have?

A. After I left Port Arthur on the 17th of February, 1904, I had no connection whatever with the firm of Clarkson & Company or their business.

Cross-interrogatory No. 10:

Q. What do you personally know of the shipment of 35,312 sacks of flour per Steamship Hyades?

A. All I know about this shipment is that a steamer belonging to either the Boston Steamship Company or the Boston Towboat Company and called either the 'Hyades' or the 'Pleiades' arrived at Port Arthur on or about the 8th of February, 1904, and while I was manager of the firm of Clarkson & Company at Port Arthur. Just when the steamer referred to arrived I am unable to give the precise date as I was away from Port Arthur on her arrival. On my return to Port Arthur on the afternoon of the 9th of February, 1904, I saw the steamer in the harbor. I arrived after a bombardment by the Japanese fleet and after a considerable delay was able to go on shore, and when I arrived at the office of Clarkson & Company I was told that it was impossible to obtain coolies to continue the discharge of the steamer's cargo. It was too late then on that day to do anything other than to make some effort to protect that part of the cargo which had already been discharged. On the 10th of February, 1904, the captain through the first officer demanded of me as manager of the firm, Clarkson & Company, who were the agents of the steamer, that the steamer be allowed to leave the port, and I thereupon solicited the assistance of one of the managers of the Russo-Chinese Bank to accompany me to the admiral who acted as commander of the port to endeavor to arrange with him to give
199 permission to allow the steamer to proceed on her voyage. The commander of the port asked me what cargo she had and I told him that it was impossible for me to say what part of her cargo had been discharged and what part to be discharged in as much as some of the lighters had undoubtedly been sunk by the Japanese shells and that a good deal of the cargo had unquestionably been stolen by his own sailors and the Russian soldiers and Chinese. After a good deal of talk he promised me that he would send a sufficient number of sailors on board of the steamer the following day to discharge the rest of the cargo destined for Port Arthur, after which he would give permission for the steamer to leave the port. On the following day a certain number of sailors were sent on board of the steamer and a certain part of the remainder of the cargo was discharged. What part of it is impossible for me to say, and then the steamer was allowed to leave, which she did, for Chefoo.

Cross-interrogatory No. 11:

Q. Did not the Hyades arrive at Port Arthur January 17/30, 1904?

A. To the best of my knowledge the steamer Hyades or Pleiades whichever one it was, arrived at Port Arthur on the 8th day of February, 1904.

Cross-interrogatory No. 12:

Q. Had you not then been discharged as manager of the business of Clarkson & Company at Port Arthur?

A. Positively not, although Mr. Clarkson's letter was written on the 30th of January, 1904, as I have already stated, but it never reached my hands until the 29th of February, 1904.

Cross-interrogatory No. 13:

Q. Did you ever see a certain draft in writing dated December 11th, drawn by the Centennial Mill Company upon Clarkson & Company, requiring the said Clarkson & Company to pay ninety (90) days after date to the holders of said draft the sum of thirty-six thousand one hundred and ninety-four dollars and 80/100 dollars ($36,194.80) with interest, exchange and collection fees? If so, state on what date or dates you saw such draft and where it was when you saw it, and specifically state the last time that you
200 saw said draft and where it then was?

A. I have no recollection of ever having seen such a draft.

Cross-interrogatory No. 14:

Q. Were you in Port Arthur on January 30th, 1904? If so, did you personally on that date accept on behalf of Clarkson & Company the draft referred to in the preceding cross-interrogatory?

A. Yes, sir. I have no recollection of ever having done so but it is quite possible that I did.

Cross-interrogatory No. 15:

Q. Who, if any one did accept said draft?

A. I do not now recollect having accepted said draft but it is possible I did so; otherwise I do not know.

Cross-interrogatory No. 16:

Q. On what date was the first bombardment of Port Arthur by the Japanese?

A. On the night of the 8th and 9th of February, 1904.

Cross-interrogatory No. 17:

Q. Was it not January 27, 1904?

A. It was not.

Cross-interrogatory No. 18:

Q. Were you not, within a few days after January 27, 1904, ordered out of Port Arthur by General Stoesell, the Russian com-

mander of Port Arthur; and did not you and Czeckowitz both leave Port Arthur in pursuance of that order, before February 8/22nd?

A. I was ordered to leave Port Arthur on the 9th or 10th of February, 1904. Mr. Czechowitz was never ordered to leave but left late in the afternoon of the 8th or early on the morning of the 9th of February, 1904, whereas I left Port Arthur on the 17th of February, 1904.

Cross-interrogatory No. 19:

Q. Where did you go then?

A. To Shanghai by way of Newchang and Chinwantau.

Cross-interrogatory No. 20:

Q. When, if at all, did you go back to Port Arthur?

A. I have never been in Port Arthur since.

201 Cross-interrogatory No. 21:

Q. Who, if you know, represented Clarkson & Company at Port Arthur after you were discharged?

A. After I left Port Arthur I believe Mr. Lindquist was sent down from Vladivostok to look after the affairs of Clarkson & Company at Port Arthur.

Cross-interrogatory No. 22:

Q Did not Clarkson & Company appoint Newhart manager at Port Arthur February 10/23, 1904, in place of you and Czeckowitz?

A. I have no definite knowledge regarding that matter but it would seem impossible that the firm of Clarkson & Company could have appointed a mere youngster like Newhard as manager of their affairs at Port Arthur.

Cross-interrogatory No. 23:

Q. And did not C. W. Lierogusoff succeed Newheart February 18-March 3rd?

A. I never heard of Lierogusoff; never heard of him.

Cross-interrogatory No. 24:

Q. Are you the W. S. Davidson who, shortly after your discharge as manager of Clarkson & Company at Port Arthur, undertook to sell a lot of flour belonging to or in the possession of Clarkson & Company to Ginsburg & Company?

A. I am the W. S. Davidson who, while still manager of the firm of Clarkson & Company at Port Arthur and before I left that port, did sell to Ginsburg & Company a certain quantity of flour.

Cross-interrogatory No. 25:

Q. And did you not sell that flour at two (2) roubles per sack?

A. It is impossible for me to say at this late date the precise price at which the flour was sold for under this arrangement with Ginsburg & Company.

Cross-interrogatory No. 26:

A. And was not the market price of flour in Port Arthur at that time from 2.5 to 3. roubles per sack?

A. There was no market price of flour at that time. The Russians were too busy saving their skins to think of establishing
202 a definite price for edibles as is usual in cases of besieged ports.

Cross-interrogatory No. 27:

Q. And was not your attempted sale to Ginsberg & Company at 2.4 roubles per sack?

A. As I have already stated I do not remember the precise price at which I made the sale to Ginsburg & Company.

Cross-interrogatory No. 28:

Q. And were there not two separate bills of sale made by you to Ginsburg & Company for that flour, one at 2. roubles and the other at 2.4 roubles?

A. It is quite true that there were two prices arranged by me with Ginsberg & Company. The lower price was sufficient to meet the draft. I saw no reason whatever for allowing the profit on the shipment of flour to be paid into such a pawn-broking establishment as the Russo-Chinese Bank.

Cross-interrogatory No. 29:

Q. And did not Ginsberg & Company pay you the difference between the two rates, about .4 roubles per sack, part cash and part in a draft on Shanghai? Explain fully about that matter?

A. I made the sale to Ginsburg & Company at what I considered a fair market value under the circumstances, namely, that I had to leave Port Arthur and that there was no one there I considered eligible to succeed me. The profit was 20 to 25 per cent as near as I can remember. I arranged that a sufficient part of the profits of the sale to meet the draft should be paid into the Russo-Chinese Bank, and as I have already stated, owing to the Russo-Chinese Bank closing its doors on account of the shortage of funds, Ginsburg & Company were unable to pay me in cash but they did give me a draft on their agents in Shanghai. When I made this arrangement I was sold manager of the firm of Clarkson & Company at Port Arthur, a position which I had held since April, 1900, acting under a power of attorney which gave me full and complete powers to carry on the business of the firm of Clarkson & Company. Knowing that Clarkson & Company owed the Russo-Chinese Bank a considerable amount of money, and knowing that the bank would suffer severe
203 losses as a result of the war between Russia and Japan and knowing also that the firm of Clarkson & Company would be in need of funds to carry them along while the war was in progress, I had no hesitation in accepting and taking Ginsburg & Company's draft on their firm in Shanghai, which it was my intention to pay into Clarkson & Company's branch at Shanghai, but upon my arrival

in Shanghai on the 28th of February, 1904, I was presented on the following day by Mr. Hunter with Mr. Clarkson's letter, what was called my discharge, dated the 30th of January, 1904, and I naturally did not pay this draft into the branch firm of Clarkson & Company at Shanghai. I have been a resident of Shanghai ever since and if it is intended by this cross-interrogatory to throw or cast discredit on my standing or my connections, business or otherwise in Shanghai or elsewhere, I want here to say that I have ever since been in a position to refund the sum of fifteen thousand roubles, the amount called for in the draft, providing the firm of Clarkson & Company can establish any good claim to it.

Cross-interrogatory No. 30:

Q. And did not Clarkson, then at Vladivostok, find out about the transaction between you and Ginsburg & Company and procure the assistance of the Russo-Chinese Bank at Port Arthur in stopping it?

A. I do not know what happened at Port Arthur after I left.

Cross-interrogatory No. 31:

Q. And did not the Russo-Chinese bank at Port Arthur stop your said transaction with Ginsburg & Company; and did not Ginsburg & Company, through the interference of the Russo-Chinese Bank stop payment of the draft they had given you on Shanghai?

A. I know nothing whatever about what happened at Port Arthur after I left. It is true, however, the payment of the draft was stopped in Shanghai.

Cross-interrogatory No. 32:

Q. What was the amount of that draft; was it not about fifteen thousand roubles?

A. Yes sir.

204 Cross-interrogatory No. 33:

Q. Is it not a fact that after the transaction with you Ginsburg & Company, and in April, 1904, as a compromise with Clarkson & Company, who claimed that you had not authority to make sale of the flour, paid to Clarkson & Company the full price of 2.40 roubles per sack for the same flour; and did not the flour at that price amount to 67,000 roubles?

A. I do not know.

Cross-interrogatory No. 34:

Q. Was any of the flour you attempted to sell to Ginsburg & Company part of the Hyades flour?

A. The flour I sold to Ginsburg & Company formed a part of the shipment that arrived in Port Arthur on or about the 8th of February, 1904.

Cross-interrogatory No. 35:

Q. How many cargoes of flour were received by Clarkson & Com-

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pany while you were their manager at Port Arthur, against which drafts for collection were held by the Russo-Chinese Bank?

A. I should say about a dozen.

Cross-interrogatory No. 36:

Q. Was the course of dealing in connection with flour different from that in the case of any other importation of merchandise; if it was, state what was the difference?

A. I made an arrangement with Mr. Thompson of the Centennial Mill Company in San Francisco in October or November, 1898, by which the Centennial Mill Company were to draw on Clarkson & Company for the value of all flour shipment at ninety days' sight without bank credit. The only other merchandise imported by Clarkson & Company regularly was an explosive supplied by a firm in New York, but I believe that no shipments of this material were ever made except under bank credits. These were the only two classes of goods imported regularly. It is true that such things as coal were bought in China from Tientsin, a port only thirty hours teaming away from Port Arthur, on special arrangements, and to this day I believe Clarkson & Company owe the Chinese Engineering & Mining Company, the suppliers of coal, something like
205 seventy-five thousand Mexican dollars. All other goods that were imported from either America or Europe were only shipped under bank credit.

Cross-interrogatory No. 37:

Q. If you shall have answered in response to direct interrogatories Nos. 34 to 37, inclusive, that some sort of instrument was customarily executed by the consignee of goods to a bank holding bills of lading and a draft against the goods, that there was such an instrument in the case of the Hyades flour, and that you have no copy of the instrument, please exhibit to the consul an original instrument of the kind you alluded to, procuring it from any source you can, and annexing a copy of it to your deposition as an exhibit with the consul's identification.

A. It is impossible for me to procure a similar instrument to the one which was customarily in use in Port Arthur at that time and which the firm of Clarkson & Company executed in favor of the Russo-Chinese Bank at Port Arthur at the time the bank's rendered bills of lading for shipments of merchandise before the draft had been met.

Cross-interrogatory No. 38:

Q. What would have been the use or purpose of any such an instrument in a case where the flour or the merchandise had already come into the possession of Clarkson & Company as agents of the steamship company?

A. In order to differentiate between Clarkson & Company as agents of the steamer and Clarkson & Company consignee of the cargo for which they had not paid and respecting which cargo they still recognized the Russo-Chinese Bank as the owners.

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Cross-interrogatory No. 39:

Q. Your attention is called to a letter addressed by Clarkson & Company of Vladivostok to Clarkson & Company at Port Arthur, of date July 18/31, 1903, a copy of which is hereby annexed, and marked exhibit 1 to cross-interrogatory No. 40, and you will please state whether or not the practice of the 'smaller class of merchants' therein spoken of is the 'custom' to which you have alluded in your answers to interrogatories?

A. Positively not.

206 Cross-interrogatory No. 40:

Q. How do you know that any such practice was followed in the case of the Hyades flour; when you had not been in the employ of Clarkson & Company or in Port Arthur for several months when the flour was sold?

A. As I was in Port Arthur when the flour was sold and as I sold the flour myself I know what I am talking about.

Cross-interrogatory No. 41:

Q. If you have stated that the Russo-Chinese Bank had knowledge of the Hyades flour outside of the documents in its possession, give the names of the individuals representing it who had such knowledge?

A. It is presumable that the Russo-Chinese Bank had in its employ men with some intelligence and consequently that when they received a draft with the documents attached covering a specific shipment that they would make it a point to find out when such a shipment arrived. As to that shipment of flour by the Centennial Mill Company which arrived at Port Arthur on or about the 8th of February, 1904, I know positively that I solicited the assistance of one of the managers of the Russo-Chinese Bank to go with me and interview the admiral in order to get permission to have the steamer leave Port Arthur and was accompanied by him. It must therefore have been known to the Russo-Chinese Bank that the particular shipments had arrived.

Cross-interrogatory No. 42:

Q. State who were the managers of the Russo-Chinese Bank at Port Arthur from January 1st to May 1st, 1904.

A. As I left Port Arthur on the 17th of February, 1904, it is unreasonable to expect that I should know who represented that institution, the Russo-Chinese Bank until the first of May, 1904. From the first of January, 1904, until the time I left, February 17th, 1904, I remember the names of two of the representatives of the Russo-Chinese Bank at Port Arthur, namely Berg and Offsiankin, who were acting as directors or managers of the Russo-Chinese Bank branch at Port Arthur.

Cross-interrogatory No. 43:

Q. State how you know that the individual you name (if you

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name any) representing the Russo-Chinese Bank at Port
207 Arthur had knowledge of the Hyades flour, outside of the documents in its possession; and give all conversation you had with them, or either of them.

A. One of the two persons named in my answer to the preceding question accompanied me at the time I had my interview with Admiral Grevy and assisted me in getting permission from the Admiral to have the steamer carrying the flour in question allowed to leave the port, Port Arthur.

Cross-interrogatory No. 44:

Q. Did you on behalf of Clarkson & Company make any specific agreement with the Russo-Chinese Bank concerning the sale or delivery of the shipment of flour for which the said draft was drawn in payment? If so, state the precise date of such agreement and the name of the officer *of the officer* of the Russo-Chinese Bank with whom you made the same?

A. As I have already stated, on or about the 15th of Februarv. 1904, I personally notified either Mr. Berg or Mr. Offsiankin, responsible officers of the Russo-Chinese Bank at Port Arthur, of the arrangement I had made with Ginsburg & Company by which Ginsburg & Company were to take over all of the flour stored in the godowns of Clarkson & Company and to pay the proceeds of such sale into the Russo-Chinese Bank against a certain draft drawn by the Centennial Mill Company.

Cross-interrogatory No. 45:

Q. If you shall state in answer to the last cross interrogatory that you did make such specific agreement, state whether the same was oral or in writing, and if in writing, attach the same or copy thereof to this deposition. If the same were oral, state the precise language used by each of the parties thereto?

A. The information conveyed to the Russo-Chinese Bank about the sale of the flour to Ginsburg & Company was done orally. Eight years have elapsed since this conversation took place and it is impossible for me to remember the precise language used on that occasion by any of the parties thereto.

Cross-interrogatory No. 46:

Q. Did the Russo-Chinese Bank, through any of its authorized officers, ever, of your own knowledge, state of Clarkson & Company that Clarkson & Company might take delivery of said cargo
208 of flour before the payment of the said draft? If so, state the name of the officer of the Russo-Chinese Bank who gave such consent and the precise times and places at which the same was given.

A. In the interview referred in the preceding answer which I had with Mr. Berg or Mr. Offsiankin of the Russo-Chinese Bank they agreed to the arrangement I had made with Ginsburg & Company.

Cross-interrogatory No. 47:

Q. If, in response to the last cross interrogatory, you shall have

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stated that such consent was given, state whether or not the same was in writing. If in writing attach the original or copy thereof to this deposition. If oral, state the precise terms thereof and by whom given?

A. I have already stated in my answer to cross-interrogatory No. 45, the interview was conducted orally and it is impossible for me to remember the language used on that occasion by any of the parties taking part therein.

Cross-interrogatory No. 48:

Q. Is it not a fact that after the outbreak of the war Port Arthur was threatened with great danger from the bombardment of the Japanese forces and was not the building of the Russo-Chinese Bank struck by shells of the Japanese forces?

A. I only remained in Port Arthur for eight days after the outbreak of hostilities. During these eight days the old quarters of the Russo-Chinese Bank were not struck by any shells of the Japanese forces. On the day I arrived at Port Arthur, the 9th of February, 1904, I landed after the bombardment which had taken place on the morning of that date and I saw the Russo-Chinese Bank moving their belongings from the premises in the old town in which they had done business since the Russian occupation of Port Arthur, to a newly constructed building located in the new town. I believe it was their intention to move their establishment into the new premises about that time. While they may have been influenced as a result of the outbreak of war to do so a little sooner than they otherwise would have done I don't think so.

209 Cross-interrogatory No. 49:

Q. Do you know that the Port Arthur branch of the Russo-Chinese Bank found it necessary to transfer a part of their valuables and documents for safekeeping to Harbin?

A. I do not know that the Russo-Chinese Bank found it necessary to transfer any of their valuables or documents to Harbin for safekeeping.

Cross-interrogatory No. 50:

Q. If, in answer to the direct interrogatories, you have stated that Clarkson & Company were allowed to take delivery of cargoes without production of the bill of lading, state if, in each case payment had not first been made to the Russo-Chinese Bank for the goods, and also state whether or not such custom prevailed only as related to bills of lading which the Russo-Chinese Bank has sent to Harbin for safekeeping?

A. I have not stated that Clarkson & Company were allowed to take delivery of cargoes without production of the bill of lading.

Cross-interrogatory No. 51:

Q. Do you know whether or not the draft dated December 11, 1903, heretofore referred to, was sent by the Russo-Chinese Bank from Port Arthur to Harbin?

A. I did not.

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Cross-interrogatory No. 52:

Q. If, in answer to the thirty-fourth direct interrogatory, you shall have stated that the Russo-Chinese Bank did consent to the sale of the flour prior to the payment of the draft, then state whether or not you intend by your answer to refer to the particular consignment of flour for which the said draft was given in payment; and if you shall have stated that it did so refer to such particular consignment of flour, then state if you have, in answer to said forty-fourth direct interrogatory, stated all the terms of the agreement by which such consent was manifested?

A. My answer to direct interrogatory number thirty-four referred to the consignment of flour which arrived by the steamer that arrived at Port Arthur on the 8th day of February, 1904, and to the best of my recollection, I have stated all the terms of the agree-
210 ment by which consent was manifested.

Cross-interrogatory No. 53:

Q. If, in answer to the thirty-seventh direct interrogatory, you shall have stated that there was a custom existing between the Russo-Chinese Bank and Clarkson & Company, requiring a written instrument or guarantee to be executed by Clarkson & Company to the Bank, then state whether or not such custom did not refer to and was used only in cases where the bills of lading had been sent by the plaintiff to Harbin for safekeeping?

A. It positively referred to all cases where the amount involved was what might be called considerable, such as would be the case in the matter of flour shipments.

Cross-interrogatory No. 54:

Q. Were not the written instruments our guarantee you have mentioned in substantially the form of the two letters annexed hereto, and marked Exhibits 1 and 2, to Cross-Interrogatory number fifty-four?

A. The written instruments referred to by me were in no wise similar to the two letters marked Exhibits 1 and 2 of the cross interrogatory fifty-four which have been shown to me by the Consul-General before whom this deposition is now being taken. These letters refer to shipments made to Port Arthur for various firms by steamers for which Clarkson & Company acted as agents, and to the consignee of such cargo Clarkson & Company would refuse to deliver the goods until Clarkson & Company received letters similar to these from the bank, showing that all dues had been paid on said cargo, and these letters show positively that the Russo-Chinese Bank did look after cargo for which they held the documents and saw to it that the cargo was not delivered to consignees until the cargo was paid for.

Cross-interrogatory No. 55:

Q. If you shall, in answer to the fifty-seventh direct interrogatory, state that you know that the draft in question was paid, then state the exact date when the same was paid and by whom, giving the

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manner of payment, whether by check or by cash. If by check, state on what bank the same was drawn, and, if possible, attach a copy thereof to this deposition?

211 A. I have not made any such statement in answer to direct interrogatory number fifty-seven.

Cross-interrogatory No. 56:

Q. Have you ever been an officer or employee of the Russo-Chinese Bank?

A. No; but in 1897 before I joined the firm of Clarkson & Company I examined some gold mines for Messrs. Epstein and Maslemnikoff, two of the managers of the Russo-Chinese Bank at Vladivostok at that time.

Cross-interrogatory No. 57:

Q. Did you, during the period covered by the Russian-Japanese War, personally have charge of the business of Clarkson & Company at Port Arthur or was that business in charge of another local manager there? If the latter, state the name of such manager?

A. I had charge of the business of Clarkson & Company at Port Arthur until the 17th day of February, 1904. I have no positive knowledge as to who was there in Port Arthur managing the business of Clarkson & Company after I left.

Cross-interrogatory No. 58:

Q. Did you personally attend to all the transactions taking place between the firm of Clarkson & Company and the branch of the Russo-Chinese Bank at Port Arthur?

A. I did not.

Cross-interrogatory No. 59:

Q. Is it not a fact that most of the transactions between the said firm took place while you were absent from Port Arthur and that you had no personal knowledge of the same at the time?

A. This is not true as I was not absent from Port Arthur for any long periods during the years I was manager there for Clarkson & Company. During the year 1903 I was not absent for any long period of time; during the year 1902 I was absent for three months; during the year 1901 I was never absent any more than a week at a time and on very few occasions, and during the year 1900 I was only absent on two occasions, once for ten days and once for three months, so that while I may not have actually gone around

212 to the bank and personally conducted the business, I had full knowledge of all transactions between the bank and Clarkson & Company, the Russo-Chinese Bank and Clarkson & Company.

Cross-interrogatory No. 60:

Q. Did you or the firm of Clarkson & Company have any correspondence with the National Bank of Commerce of Seattle with reference to the facts involved in this case and either before or after the first trial thereof. If so, and you have such correspondence in

your possession, please attach copies thereof to this deposition. If you have not the original, state as fully and precisely as you can recall the substance of such correspondence?

A. I never had any correspondence with the National Bank of Commerce of Seattle with reference to the facts involved in this case. As for Clarkson & Company having had any correspondence with said National Bank of Commerce of Seattle you must ask them for I do not know.

Cross-interrogatory No. 61:

Q. Did you ever, prior to the commencement of this suit in April, 1908, inform the National Bank of Commerce of Seattle, or any of its officers, that the draft dated December 11th, 1903, for Thirty-six thousand one hundred and ninety-four and 80/100 Dollars ($36,-194.80) had been paid by Clarkson & Company to the Russo-Chinese Bank? If this information was given by letter, attach to this deposition copies thereof, and if oral, state as precisely as possible the terms of such communication?

A. I did not.

Mr. Gregory: May it please the Court, I now ask that all the statements given by the witness, W. S. Davidson concerning the specific arrival of the steamer, and also all his statements concerning the transactions with Ginsberg, be struck out, as it now conclusively appears that his entire testimony is limited to the steamer which arrived at Port Arthur on or about February 8, 1904, and it is admitted in this case that the steamer Hyades left Port Arthur on January 22, 1904.

Mr. McCord: I resist the motion, Your Honor.

The Court: I deny the motion.

213 Mr. Gregory: Note an exception.

The Court: Exception allowed.

(EXHIBIT A TO ANSWER TO CROSS-INTERROGATORY No. 5.)

"Jan. 17th/30th, 1904.

12868.

Mr. W. S. Davidson, Port Arthur.

DEAR SIR: We herewith notify you that we have made Czechowicz, sole manager of our Port Arthur office, and will ask you to turn over to him, all business of the Company's that you have on hand. While we do not think in any way, that we are bound to give you one day's notice, or keep you a day longer after you receive this letter, we will agree to pay you one month's salary in advance. We will expect you to wind up your business with the office at the earliest possible moment, and will ask you to at once look for new quarters, so that your present living quarters will be at our disposal, at your earliest convenience. We have given Mr. Czechowicz a new

Power of Attorney, making him our sole manager, and the P/A which you have recently received from us, we will ask you to turn over to him.

Yours very truly,

CLARKSON & CO.

Presented to Mr. Davidson at Shanghai on 29 Feb., 1904. pp. Clarkson & Co.

A. C. HUNTER.

W. S. DAVIDSON.

AMOS P. WILDER,
Consul General of U. S. A."

And thereupon the plaintiff, before the Court had given his charge to the jury, and while the jury were in the jury box in writing requested the Court to charge the jury as follows, to-wit:

I.

That the evidence shows, without contradiction, that such draft had not been paid, and I therefore instruct you to find a verdict in favor of the plaintiff for the above amount, with interest at
214 the rate of six per cent per annum on $36,113.70 of said sum from November 9, 1904, and on $2,298.49 of said sum from December 16, 1904, which charge was by the Court refused and plaintiff duly excepted and its exception was allowed.

II.

By the decision of the Court of Appeals in this case, 187 Fed. 80, it has been made the law of the case that the complaint states a cause of action, both upon an implied and express contract; that a showing to support the implied contract was made prima facie that the money was paid under a mistake of fact.

The payment was made entirely upon the belief of both parties to the transaction that the draft had been paid to the Port Arthur branch. This belief was admittedly erroneous, and therefore plaintiff becomes entitled to its money, as a matter of law, which charge was by the Court refused and plaintiff duly excepted and its exception was allowed.

III.

I charge you that the Russo-Chinese Bank in this case, in acting as the collecting bank of the draft in question, and as the agency to transmit the documents in question, was bound to use only reasonable and ordinary care and diligence in the exercise of this relationship. In the absence of special instructions, it was not obliged to insure the flour, or see that the same was stored, or to make any inquiries concerning the custody and disposition of the flour. In the absence of special instructions its sole responsibility, as such collecting bank, was to preserve the documents safely, to promptly present the draft for acceptance, and upon non-payment, to protest the same.

The evidence in this case shows that the Russo-Chinese Bank did comply with all of the foregoing obligations imposed upon it by its relation, and that there were no special instructions given it by the National Bank of Commerce of Seattle, except to hold the documents against payment, which the Russo-Chinese Bank did. I therefore instruct you that there is no evidence of negligence against the Russo-Chinese Bank, so far as the disposition of the flour was concerned, which charge was by the Court refused and plaintiff
215 duly excepted and its exception was allowed.

IV.

A collecting bank, in the absence of special instructions, has no responsibility concerning the goods. Its sole obligation is with the documents, which charge was by the Court refused and plaintiff duly excepted and its exception was allowed.

V.

In this case, it appears that prior to the draft in question having been sent by the defendant Bank to the plaintiff, the defendant Bank had entered into an arrangement with the Centennial Mill Company, the drawer of the draft, by which the defendant Bank was relieved of all responsibility in connection with said draft. I charge you that by this arrangement, the Russo-Chinese Bank, as the agent of the defendant Bank, was also relieved of responsibility to the full extent of the said agreement. That is, that the Russo-Chinese Bank, as the collecting bank, could not be held to any greater responsibility in the matter than the National Bank of Commerce of Seattle, from whom it received the draft, which charge was by the Court refused and plaintiff duly excepted and its exception was allowed.

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I charge you that, in any event, the Russo-Chinese Bank in this matter was only bound to use reasonable and ordinary care and skill. It was not bound to use any extraordinary efforts in connection with the said documents and shipment. Thus, for example, there was no duty imposed upon the Russo-Chinese Bank to investigate as to who were the agents of the steamship line at Port Arthur, or as to whether or not Clarkson & Company were the agents of the steamship line, and there was, therefore, no negligence on the part of the Russo-Chinese Bank in failing to notify the National Bank of Commerce of Seattle that Clarkson & Company were the agents of the steamship line at Port Arthur, which charge was by the Court refused and plaintiff duly excepted and its exception was allowed.

VII.

In other words, if you believe that, under the circumstances, the Russo-Chinese Bank used reasonable care and prudence in
216 failing to mail to the defendant, the draft in question, until the 26th day of May, 1904, then such delay in no wise preju-

dices the right of the Russo-Chinese Bank to recover in this case. All that its officials at Port Arthur were obliged to do was to use reasonable care and diligence, and if you believe that the conditions there at that time were such that reasonable men might differ as to the proper course to pursue, then the Russo-Chinese Bank is entitled at your hands to a wide discretion in that regard, which charge was by the Court refused and plaintiff duly excepted and its exception was allowed.

VIII.

In relation to the affirmative claims set up by the defendant, I advise you that they are as follows:

(1) That the draft in question was placed by Clarkson & Company with the plaintiff. In this connection I charge you that there is no evidence on the part of the defendant that this draft was so paid, either in whole or in part, and therefore, this first affirmative defense of the defendant must be disregarded by you.

(2) The second affirmative defense relied upon by the defendant, is that the Russo-Chinese Bank did not present this draft for acceptance upon its arrival, or upon the succeeding day, and did not present the draft for acceptance for several weeks thereafter. In this connection, I charge you that the burden of proof is upon the defendant to prove that the Russo-Chinese Bank did not present such draft for acceptance upon the day of its arrival, or upon the succeeding day, and that the uncontradicted evidence in this case shows that such draft was presented for acceptance on January 23, 1904, being the day after its receipt at Port Arthur by the plaintiff. I therefore instruct you that you must disregard the second affirmative defense set up by the defendant.

(3) The third affirmative defense set up by the defendant in its answer, is that it was, by the custom of bankers, made the duty of the plaintiff to look after, protect and care for the flour represented by the bill of lading upon its arrival at Port Arthur, and that it was the duty of the plaintiff to warehouse the flour and insure the same, and that it was the duty of the plaintiff, by reason of the
217 instructions given plaintiff by defendant, and by reason of the custom among bankers, not to permit the said flour to be appropriated by Clarkson & Company, or any one else.

In this connection I charge you that there were no instructions given by defendant to plaintiff concerning the care of the flour, and that the only instructions given were to hold the documents against payment; that it was not the duty of the plaintiff to either look after, protect or care for the flour represented by the bill of lading upon its arrival at Port Arthur, or at all, and that it was not the duty of the plaintiff to warehouse the flour, or to insure the same, and that it was not the duty of the plaintiff to prevent the said flour being appropriated by Clarkson & Company, or by any one else, which charge was by the Court refused and plaintiff duly excepted and its exception was allowed.

IX.

The evidence shows that the only instructions given to plaintiff by defendant, in regard to the draft and accompanying documents, was to hold them against payment. I instruct you that no custom or usage could impose additional obligations upon plaintiff in this regard than those imposed by this instruction from defendant to plaintiff. Also that defendant did not instruct plaintiff to insure or store the flour and that no custom or usage could impose this obligation upon plaintiff, which charge was by the Court refused and plaintiff duly excepted and its exception was allowed.

X.

If you shall believe that the Russo-Chinese Bank was negligent in any respect in regard to its duties in the premises, then I charge you that it is liable, if at all, only for such actual damages as were directly suffered by the Seattle Bank by reason of such negligence. That is, even if you believe that it was the duty of the plaintiff to insure and store this flour and take it out of the control of Clarkson & Company, but that nevertheless if plaintiff had done these things, the flour would have been lost or destroyed by reason of the war conditions at Port Arthur, then I instruct you that such negligence
218 cannot be considered by you, but that plaintiff is entitled to recover regardless of such negligence, which charge was by the Court refused and plaintiff duly excepted and its exception was allowed.

XI.

In relation to the payment by Clarkson & Company to the Russo-Chinese Bank of the sum of 67,000 roubles, which had been obtained from Ginsburg & Company, I instruct you that the Bank, in applying such payment, was controlled by the instructions then given it by Clarkson & Company, and that the Bank did not have any right to apply this money, or any part thereof, to any drafts, or any other account, than as specifically directed by Clarkson & Company.

I furthermore instruct you that if there had been no directions given by Clarkson & Company, the Bank would not have had the right to hold the same against a draft which was not then payable.

I furthermore instruct you that the Bank had no right to accept a partial payment for the draft, and deliver the bills of lading upon such partial payment. It was the duty of the Bank to hold these documents until the draft was fully paid. The sum of 67,000 roubles was not sufficient to pay in full the draft in question, and therefore I instruct you that even if all this money had been paid in by Clarkson & Company for the payment of this draft, the Bank would have had no right to deliver the documents until the remainder of the draft had been paid, which charge was by the Court refused and plaintiff duly excepted and its exception was allowed.

XII.

In considering the duty of the Russo-Chinese Bank to notify the National Bank of Commerce of Seattle of the fact that Clarkson & Company were the agents of the steamship company, I instruct you that if you believe that the Russo-Chinese Bank did not, at that time, know such fact, or if you believe that the Centennial Mill Company, or its representatives, did, at that time, know such fact, then there was no necessity for the plaintiff to give any notice to the defendant concerning the same.

219 I furthermore instruct you that there was no duty imposed upon the plaintiff whatever, in connection with this transaction, until after it had received the draft in question, which the evidence shows was on January 22, 1904; that unless the Bank had special cause to believe that, at that time, Clarkson & Company were insolvent, or intended in some way to illegally remove the flour from it warehouse, there was no duty whatever imposed upon the plaintiff Bank to send any notice of these things to the defendant.

I furthermore instruct you in this connection, that if you believe that the representative of the Centennial Mill Company was present in Port Arthur during a portion of the time that this flour was in the warehouse of Clarkson & Company, and if the Russo-Chinese Bank knew that this representative was so present on the business of the Centennial Mill Company, then there was no obligation imposed upon the Russo-Chinese Bank to give any notices or make any inquiries concerning the disposition of the flour, because it had a right to believe that all of such matters were being attended to by the representative of the Centennial Mill Company, which charge was by the Court refused and plaintiff duly excepted and its exception was allowed.

XIII.

I instruct you that the contract between the Boston Towboat Company and the Centennial Mill Company was evidenced by a contract in writing, to-wit: the Bill of Lading, and I instruct you further that such written contract could not be altered or varied by parole or oral arrangements which were not executed, which charge was by the Court refused and plaintiff duly excepted and its exception was allowed.

XIV.

I instruct you that money paid under a mistake of fact can be recovered by the party so paying, if the mistake is proved, which charge was by the Court refused and plaintiff duly excepted and its exception was allowed.

And thereupon the Court charged the jury as follows:

GENTLEMEN OF THE JURY: In this case the plaintiff seeks to
220 recover from the defendant the sum of $38,412.19 with interest, being the return of the same amount of money paid to the defendant, the National Bank of Commerce of Seattle, by the

plaintiff, the Russo-Chinese Bank, in two payments made respectively on November 9, 1904, and December 5, 1904.

In this case I instruct you that the uncontradicted evidence shows that these payments were made by the plaintiff to the defendant in reliance upon the representations of the defendant that a draft drawn by the Centennial Mill Company against Clarkson & Company, dated December 11, 1903, had been paid to the Port Arthur branch of the plaintiff.

The plaintiff proceeds upon two theories of the liability of the defendant bank to repay this money. One theory is that there was an express promise, in writing, to repay it if it should be ascertained that the Port Arthur branch of the Russo-Chinese Bank had not collected the money on the draft. The other theory is that there was an implied promise to repay the money if it should be ascertained that the money had not been collected by the Port Arthur branch, because in that case the money was advanced and paid to the defendant upon a mistake of fact. Upon either one of these theories the right to reclaim the money would be dependent upon the question of whether the draft had been collected at Port Arthur by the branch bank, and I will submit to you a question to be answered by the jury, in the nature of a special verdict on this question of the payment of the draft at Port Arthur. You will have to return a general verdict, but this will be a special verdict to determine one particular important fact in the case. You are instructed to return this verdict: "We the jury in the above entitled cause find that the Port Arthur branch of the Russo-Chinese Bank did" or "did not receive payment for the draft dated December 10, 1903, on account of which the plaint-ff made the remittance to the defendant alleged in its complaint." I find by the papers that that draft was dated December 11th, not December 10th.

Mr. Gregory: That was my mistake, Your Honor.

The Court: Now, when you decide that question, you will find the blank in this verdict in which you will insert the word "did" receive payment, if that is your decision, or the words "did not" receive payment, if you decide the question in the negative,
221 and have it returned with your verdict in the case, signed by your foreman.

When you have decided that question, if your decision answers this inquiry affirmatively your verdict in the case will be for the defendant, that will necessarily determine the whole case. The converse of that proposition would be that if you find that the draft was not paid, that your verdict should be for the plaintiff, but that is not true, because there are other matters involved which have been litigated in this action and which the jury are required to pass upon before determining the case in favor of the plaintiff bank, which will require your consideration and a determination of other questions upon which the ultimate decision of the case may necessarily turn.

The burden of proof rests upon the plaintiff to prove the facts necessary to constitute either an express promise in writing to pay or an implied promise by reason of a mistake; that is, the plaintiff

must prove the facts that are set out in the complaint as the cause of action. Those facts are a promise, in writing, to pay, or a mistake in fact by which the defendant bank obtained money from the plaintiff bank which the plaintiff bank was not obligated in any way to pay and which it did pay under a mistake of fact. Now, all those things have to be proved, and it has to be proved affirmatively by the plaintiff that the draft never was in fact paid at Port Arthur. The plaintiff is required to prove those facts by evidence amounting to a fair preponderance of the evidence when the whole case is considered. Unless there is a preponderance of the evidence in favor of the plaintiff's contentions in regard to those matters, then the plaintiff has failed to prove a cause and your verdict should be for the defendant.

Now, going beyond the question of payment or non-payment of the draft at Port Arthur, the other matters which you have to consider I will endeavor to state to you. This is a commercial transaction in which the Centennial Mill Company made a consignment of flour intended for a merchant at Port Arthur, known as Clarkson & Company. The flour was shipped from Seattle to Port Arthur without being paid for. It was a transaction by which the purchaser was entitled to receive the flour upon paying the contract price for it, and, in order to protect everybody and make
222 this transaction safe in sending a cargo of flour across the ocean, a resort was had to the usual commercial methods of doing such business. The owner of the flour, the Centennial Mill Company, drew against Clarkson & Company a draft in favor of the National Bank of Commerce of Seattle, and attached to that draft an invoice of the flour, a bill of lading and an insurance policy. The insurance policy and the bill of lading were endorsed in blank and delivered with the draft. The National Bank of Commerce paid to the Centennial Mill Company the amount of the draft, and that vested it with the title, the right to receive the money on that draft and the title to the flour. I should say that the bill of lading called for the delivery of the flour to the order of the consignor, the Centennial Mill Company, and when the bill of lading was endorsed in blank and delivered with the draft to the National Bank of Commerce, that vested in the National Bank of Commerce the title, the ownership of the flour. Delivery of a bill of lading drawn as this one was is the title the same as a deed to a piece of property, a bill of sale, it amounted to a conveyance of the title to the holder of the bill of lading endorsed in blank. Delivery of the bill of lading was a symbolical delivery of possession merely while the flour was in the ship, and the *water*housemen, after it had been landed and placed in a warehouse at Port Arthur, were bailees for the owner. The owner was the holder of the bill of lading and in law is deemed to be in possession as owner of the property. The National Bank of Commerce endorsed the draft so as to make it payable to the Russo-Chinese Bank at Port Arthur, and transmitted the draft thus endorsed with the other documents attached, to the Russo-Chinese Bank at Port Arthur, and it was received there by that bank. When the Russo-Chinese Bank at Port

Arthur received the draft and the accompanying documents endorsed as they all were, and undertook the business of presenting and collecting the draft, it became invested with the title and ownership of the flour as to all of the world except the National Bank of Commerce of Seattle; it had the legal right to sell and dispose of that flour and to receive the proceeds subject to its duty as an agent to account to the National Bank of Commerce for it. In receiving the documents and undertaking the business in that manner,
223 without special instruction in regard to the care of the flour and the protection of the National Bank of Commerce, it was left free to deal with the flour as an owner might. It was obligated as an agent to act in good faith to protect the rights of the National Bank of Commerce in the collection of the draft. It was authorized to do whatever was necessary in the manner of incurring expense, which would be chargeable against the property, and to be compensated out of the property in its hands, and it was required to deal with the property in the same way that an intelligent and prudent owner of property would deal with his own property, to act for and in place of the National Bank of Commerce in handling the business there at Port Arthur as the National Bank of Commerce would have acted if it had been there, and in a position to act for itself. As the agent for the owner it was obligated to account for the amount of the draft, to account for the security which the bill of lading constituted, and it cannot be excused from obligation to account by saying that the flour disappeared without its knowledge, and require the def-ndant in this case in order to fasten an obligation upon it, to prove that it was negligent. A principal does not have to prove those things in regard to property or valuables that go into hands of an agent; the agent must render an account in order to be cleared of obligation and liability. That is the rule that is to be applied in this case in determining whether the plaintiff in this case paid out money which it was not obl-gated to pay to the defendant on account of the draft.

Now, the obligation of the defendant bank to repay the money to the plaintiff bank, depends upon the general question of whether the money was actually paid through a mistake and was paid when there was no liability on the part of the plaintiff bank to pay it. If it was accountable and liable to the defendant bank and paid no more than it was liable for, it has no right of action now to get the money back.

If Clarkson & Company were agents for the steamship, the carrier, and owned the warehouse and received the flour into the warehouse, its bare manual possession would not affect the rights of the owner in dealing with the flour, nor excuse the bank at Port Arthur from the obligation of an agent to see that the flour was not disposed
224 of until paid for, because by the terms of the contract evidenced by the papers in this case, Clarkson & Company who were the drawees of the draft, were not entitled to have possession of the flour until it was paid for; they could have manual possession as the owner of a warehouse but their possession would not be the possession of an owner, it would be the possession, as I have told

you, of a bailee, that is, one who holds possession for the owner entitled to the possession. Now, being a bailee, it was the bailee not only for the owner of the flour, but bailee for the steamship company, the carrier, for the purpose of collecting freight that was earned by the transportation service. The bailee could not sell or dispose of this flour without collecting the freight and without paying the draft, unless the holder of the draft and the bill of lading consented to a sale or disposition of the flour in advance of payment of the draft.

If the bank at Port Arthur while holding the bill of lading gave consent to the sale of the flour by Clarkson & Company that consent would release the carrier from liability for misdelivery or wrong delivery of the flour, and if you find that to be the case, that eliminates that contention out of the case as to the right of either party to proceed against the carrier to collect damages for wrongful delivery.

You, gentlemen, are the exclusive judges of the questions of fact involved in this case. It is for you to determine what the facts are from the consideration of the evidence admitted upon the trial. The party having the affirmative, the burden of proof, must establish the material facts relied upon by at least a fair preponderance of the evidence; otherwise your decision as to any point will be adverse to the party holding the burden of proof for failure of evidence. You will consider the testimony in the case in its entirety and all of it in detail as far as you are able to remember it, and endeavor to arrive at the truth from the testimony as near as you can. In weighing the testimony you will apply the ordinary rules for testing the accuracy and truthfulness and reliability of the testimony of witnesses and documents. A witness whose testimony is not consistent or in accord with other testimony, or where there are discrepancies, is to some extent impeached as a witness, that is, his testimony has to be received with care and scrutiny where it is shown to be inaccurate in any particular. Discrepancies, however, do not necessarily mean that the testimony may not be true as to the most important and material facts. A man may testify positively that a consignment of flour came on one vessel when in fact he was misinformed about it. He may suppose it was so, he may have been misinformed, his memory may be at fault in regard to that, and if his testimony is inconsistent with facts which are uncontrollably true, allowance must be made for it. Where a witness wilfully and intentionally testified falsely to a material fact in a case, his testimony is then so far impeached that the jury have a right to disregard all that he has testified to except insofar as it may be corroborated by other good evidence.

The Court instructs you that anything which obstructs or suspends the ordinary commercial communications between the parties, such as the war between Japan and Russia at Port Arthur during the year 1904, will excuse the sending of notices and other acts which might have with reasonable prudence been imposed upon the Russo-Chinese Bank during the time of business. Necessity excuses all things, and the Russo-Chinese Bank was only required to use

ordinary care and diligence. If therefore you believe that by reason of the existence of war mail communications were interrupted between Port Arthur and the outside world, and also telegraphic communication, then the Russo-Chinese Bank was excused thereby to the full extent that it was so prevented from communicating with the outside world by such interference.

That instruction has application to the duties and obligations of a bank receiving a draft presented for acceptance and presented for payment, to give prompt notice of any failure on the part of the drawee to either accept or pay at the time when it is due. There is a claim made that the defendant is not liable in this case because the bank at Port Arthur neglected to present the draft for acceptance. That contention has not been sustained by the evidence. It is contended that the bank at Port Arthur neglected its duty by failure to have the draft protested for non-payment and notice given. It is a question of fact for the jury to decide about that, whether the draft was protested or not, and whether it was returned by
226 mail. There is evidence for the jury to consider that the draft and notice of protest were deposited in the mail at Port Arthur on the 26th of May, 1904. The counter evidence is that that draft and notice of protest never reached the defendant in this case. There is a legal presumption that when a letter is properly addressed and stamped and deposited in the mail, that it will reach its destination and be delivered to the person to whom it is addressed. That is not a conclusive presumption, but at any rate it is for the jury to determine whether the evidence is sufficient here to enable you to find as a fact that the draft and notice of protest were ever deposited in the mail. There is a contradiction as to the fact whether the draft was protested for non-payment. That is a question of fact for the jury, that you have to determine the best you can from the evidence in the case. If you find it necessary to decide those questions, in order to determine the liability of the defendant bank to repay the money to the plaintiff bank. If the bank at Port Arthur neglected its obligations or failed to perform its obligations in regard to presentation and demand of payment and protest and giving notice, then it became liable to the defendant for the amount of the draft and for all that it received from the plaintiff bank in the case. If so liable, the plaintiff bank has no right of action now to get the money back that it did pay to meet that liability.

With respect to the return to the defendant of the draft after it was protested for non-payment, I instruct you that if you believe from the evidence that such draft, with bill of protest, was mailed by plaintiff in the public post office of Port Arthur on May 26th, 1904, to defendant, that by such mailing plaintiff performed all the obligations imposed upon it in regard to returning the draft to defendant, and this is true, regardless of whether defendant ever received this mail communication.

The burden of proof rests upon the plaintiff in this action to establish by a fair preponderance of the evidence that the draft in question was not paid by Clarkson & Company to the Russo-Chinese Bank and that at the time the money in controversy was

paid by the plaintiff to the defendant the Russo-Chinese Bank was not indebted to the defendant in the amount of said draft
227 and that the plaintiff had not rendered itself liable to the defendant by permitting Clarkson & Company to appropriate the flour covered by the bill of lading securing the draft, and unless the plaintiff established by a fair preponderance of evidence the fact that such payment was not made by Clarkson & Company prior to the date of the payment of the money in controversy by the plaintiff to the defendant, and that the plaintiff had not rendered itself liable by permitting Clarkson & Company to sell the flour prior to the payment of the draft, then I instruct you that the plaintiff cannot recover in this action and your verdict must be for the defendant.

It is contended by the plaintiff that on the 11th day of December, 1903, the Centennial Mill Company of S[redacted] drew a draft upon Clarkson & Company at Port Arthur for $30,194.80 payable to the order of the National Bank of Commerce of Seattle. This draft was secured by a bill of lading issued by a steamship company covering about 36,000 sacks of flour shipped by the Centennial Mill Company to Port Arthur. The Centennial Mill Company was named as consignor in the bill of lading and the flour was to be delivered upon the shipper's order. Insurance policies upon the flour were also issued to the Centennial Mill Company and constituted a part of the collateral for the draft. The draft above mentioned, the bill of lading and the insurance policies, were indorsed in blank and sent by the National Bank of Commerce of Seattle to the Russo-Chinese Bank at Port Arthur, with instructions to deliver the collateral, or documents, upon the payment of the draft. By virtue of these endorsements and transfers the legal title to the draft and the documents and to the flour in question passed to and became vested in the Russo-Chinese Bank, and I instruct you that as a matter of law it was in the power of the plaintiff to handle, control, sell and dispose of such flour in any way that was deemed expedient by the plaintiff.

It is contended by the defendant in this case that upon the arrival of the draft and the documents attached thereto and the flour at Port Arthur, about the middle of January, 1904, the plaintiff entered into an arrangement or agreement with Clarkson & Company by the terms of which the plaintiff consented to and permitted Clarkson & Company to take possession of the flour
228 in question and consented that the flour be sold by Clarkson & Company to third parties in open market, and that as a part of such agreement or arrangement between the plaintiff and Clarkson & Company the bank required Clarkson & Company to give to the plaintiff a letter of guaranty, which provided that Clarkson & Company recognized the ownership of the flour by the plaintiff and stipulated that the plaintiff was the owner of the flour in question, and Clarkson & Company upon their part agreed to sell the flour and account to the plaintiff for the proceeds thereof.

If you find from the evidence in this case that plaintiff permitted Clarkson Company to take over the flour under such an arrangement as the defendant claims with the stipulation that the plaintiff was

the owner of the flour and with the agreement that Clarkson & Company would account to the plaintiff for the proceeds of the sale of the flour, then I instruct you that such action on the part of the plaintiff constitutes in law a payment of the draft in question and the plaintiff cannot recover and your verdict must be for the defendant.

It is a general rule of law that where collateral security is received for a debt with power to convert the security into money, this is specifically applicable to the payment of such debt; the same person being the party to pay and receive, no act is necessary and the law makes the application. If the proceeds equal or exceed the amount of the debt it is de facto paid; no action would lie for it, and proof of these facts would support the defense of payment. And if you find from the evidence in this case that the plaintiff did consent to Clarkson taking over the flour in question and consented to the sale of the same by Clarkson & Company, and then Clarkson & Company sold the flour in question and paid over the proceeds thereof to the plaintiff, then such payment of the proceeds of the sale of such flour to the plaintiff operated as a payment of the draft in question,—provided the proceeds of the sale of the flour equaled the amount of the draft; and if such proceeds did not equal or exceed the amount of the debt then it was a payment pro tanto—that is a payment of so much of the said draft as the proceeds of the sale of the flour would pay of the same; and this is the law, notwithstanding the fact that plaintiff may
229 have received the proceeds of the sale of said flour and placed the same to the credit of Clarkson & Company in its bank, and permitted Clarkson & Company to use said funds for other purposes.

It is contended by the defendant that at the time the plaintiff paid to the defendant the $36,113.70 and the further sum of $2,298.49, the plaintiff represented to the defendant that the draft in question had been protested for non-payment and that the defendant promised to repay the plaintiff in case the draft had not been paid was in reliance upon such representation by the plaintiff, and that such representation as to the protest of said draft was a material factor in inducing the defendant to consent to the making of such conditional promise to the plaintiff to refund the money paid by the defendant; and if you find from the evidence in this case that the draft in question was not protested within the time provided by law, then I instruct you that the defendant cannot be held to the performance of its agreement to refund the money paid to it by the plaintiff, and your verdict must be for the defendant.

The time fixed by the law for the protest for non-payment of a draft would be at the expiration of the days of grace after the payment was due. This draft was payable thirty days after acceptance or after presentation.

Mr. McCord: Ninety.

The Court: Ninety days. It is my mistake. Ninety days and two days of grace were allowed. The last day of grace is the day on which the draft should have been protested.

If you find from the evidence in this case that the plaintiff failed to protest the draft in question for non-payment after its maturity, as required by law, as I have defined the law to you, then I instruct you that such failure on the part of the plaintiff to protest the draft in question would operate to release the Centennial Mill Company, the drawer of the draft, from any liability thereon, and that the defendant would be materially injured by reason of such failure on the part of the plaintiff to have protested the draft at its maturity,
230 by so releasing the drawer of the draft from liability to the defendant, and the plaintiff cannot recover and your verdict must be for the defendant.

It has been suggested and some evidence has been introduced tending to show that the Centennial Mill Company paid to the National Bank of Commerce the amount of the draft in question. I will amend that by saying that there is testimony to the effect, and it is uncontradicted, it is to be taken as a fact in the case, that the Centennial Mill Company has reimbursed the National Bank of Commerce.

I instruct you that even if the Centennial Mill Company did pay the amount of the draft in question to the National Bank of Commerce, either prior or subsequent to the 9th day of November, 1904, when the plaintiff claims to have paid the money in controversy to the National Bank of Commerce, such payment in no way involves the issues in this case, even though the National Bank of Commerce did not notify the Russo-Chinese Bank that the amount of the draft had been paid to it. If the National Bank of Commerce under such circumstances was not acting for itself, it was acting for the Centennial Mill Company, its customer, and as such agent of the Centennial Mill Company had the legal right to demand the payment of the draft in question from the Russo-Chinese Bank, if the Russo-Chinese Bank had received payment for it from Clarkson & Company, or if by its action it had suffered the flour to be sold by Clarkson & Company and the proceeds misappropriated by them, so as to preclude the payment of the draft out of the proceeds of the sale of the flour securing the draft.

That is so, Gentlemen of the Jury, by reason of the law of this state, which authorizes a trustee of an express trust to prosecute and defend actions in its own name. Here the bank, by taking the title to the flour and acting in its business, was authorized to act in its own name clear through to the finish of the transaction, although it may now be acting in the interest of the Centennial Mill Company, which was the vendor of the flour.

In addition to the special verdict, the Court submits two forms of a general verdict. If you find for the plaintiff, you will use the form that is appropriate and insert the amount of money that
231 is due, including interest at six per cent from the time it was received by the defendant bank until this date. If you find for the defendant the other form of verdict will be sufficient, when it has been signed by your foreman.

I need not exhort the jury to consider the importance of this case and your duty as good citizens and honest jurymen to decide

the case according to the law and the rights of the parties, without ever being swayed or influenced at all by any considerations that one is a home corporation and the other is a foreign corporation; such a thing in this court ought not to have a particle of influence whatever. If this money has been obtained from the plaintiff bank when there was no liability for it to pay the money, it is entitled to get it back, according to what I have explained to you. If it is not so entitled, there ought to be no hesitation in rendering a verdict for the defendant.

And thereupon, by stipulation of counsel, after the jury had retired to consider their verdict, and before their verdict was returned, the plaintiff, by its attorney, excepted to certain parts of the charge given to the jury, as follows:

Mr. Gregory: May it please the Court, the plaintiff desires to take certain exceptions to the instructions given, and also to the instructions refused, and also to the instructions requested but modified.

1. We except to the giving of the instruction to the effect that the defendant bank became invested by virtue of the transfer to it of the documents, with the legal title to the flour; and also to the instruction and to each and every part thereof to the effect that by the endorsement and transfer of those documents the plaintiff bank became invested with the legal title to the flour.

2. We except to the instruction given to the effect that the Russo-Chinese Bank was obliged to look after and take care of the flour.

3. We except to the failure of the Court to charge the jury as to the burden of proof concerning the affirmative defenses on the part of the defendant, there having been a charge as the burden of proof so far as the allegations of the complaint were concerned,
232 but none as to the affirmative defenses of the answer.

4. We except to the instruction to the effect that if the Russo-Chinese Bank failed to give proper notice to Clarkson & Company, it, the Russo-Chinese Bank, became liable for the full amount of the draft, our claim being that if they failed to take this or any other proper step they became liable only for the amount of damage thereby actually suffered and not necessarily for the full amount of the draft.

5. We except to the instruction to the effect that the defendant had no burden to establish the fact that payment of the draft was made by Clarkson & Company to the Russo-Chinese Bank, and the further fact that the Russo-Chinese Bank did permit Clarkson & Company to dispose of the flour without payment of the draft in question.

6. We except to the instruction to the effect that if the plaintiff bank consented that Clarkson & Company should sell the flour in question prior to the payment of the draft, then that the Russo-Chinese Bank by such action rendered itself liable to the National Bank of Commerce and that it became the duty of the Russo-Chinese Bank to pay the money that it did pay to the defendant in 1904 and that the plaintiff cannot recover in this action.

7. We except to the instruction that by virtue of endorsements and transfers of the documents the legal title to the flour passed to and became vested in the Russo-Chinese Bank, and we except further to the instruction that thereby the Russo-Chinese Bank was given the power to handle, control, sell and dispose of the flour in any way that was deemed expedient by the plaintiff.

8. We except to the instruction to the effect that if plaintiff permitted Clarkson & Company to take over the flour under an arrangement between the plaintiff and Clarkson & Company which would recognize by Clarkson & Company the ownership of the flour by the plaintiff and the right of Clarkson & Company to sell the flour, that by such agreement and action on the part of the plaintiff there became in law a payment of the draft in question and that the plaintiff cannot recover, and we except to each and every
233 part of said instruction, which is numbered 11 of defendant's proposed instructions.

9. We except to the instruction that if the plaintiff consented to Clarkson taking over the flour in question and consented to the sale of the flour by Clarkson & Company and that Clarkson & Company paid over the proceeds of such sale to the plaintiff, then that such payment of the proceeds of the sale of said flour to the plaintiff operated as a payment of the draft in question.

10. We except to the instruction to the effect that where the holder of collateral security for the payment of a note or draft disposes of the collateral, it takes over the title to the same to itself with the intention of making it its own, converting it into its property, and that such action constitutes a payment of the draft or note; and we except to the instruction that if the plaintiff did take over said collateral and did consent that Clarkson & Company should sell the flour, then that such action on the part of the plaintiff operates as a payment of the draft in question; and we specifically object to such instruction upon the ground that it purports to instruct the jury that the entire draft would have been thereby paid, notwithstanding the amount or value of the flour which might have been thus disposed of.

11. We except to the instruction to the effect that if from the evidence it be found that the draft in question was not protested at the time provided by law, then that the verdict must be for the defendant.

12. We except to the instruction to the effect that if the plaintiff failed to protest the draft in question for non-payment after its maturity, then that the verdict must be for the defendant.

13. We except to the instruction to the effect that the payment to defendant by the Centennial Mill Company has no bearing upon the case.

14. We except to the refusal of the Court to give the instruction requested by the plaintiff, except as modified, to the effect that the verdict of the jury should be for the plaintiff for the amount prayed for.

234 And this was all the evidence and proceedings in the case, not otherwise of record.

And thereupon, in furtherance of justice and that right may be done, the plaintiff presents the foregoing as its Bill of Exceptions and prays that the same may be settled, allowed, signed and certified by the Judge who tried the cause as provided by law.

T. L. STILES,
CHICKERING & GREGORY,
DORR & HADLEY,
Attorneys for Plaintiff.

Received a copy of the within Bill of Exceptions April 13, 1912.

KERR & McCORD,
S. H. KERR,
Attorneys for Defendant.

Indorsed: Plaintiff's Bill of Exceptions. Filed in the U. S. District Court, Western Dist. of Washington. April 13, 1912. A. W. Engle, Clerk. By S., Deputy.

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 1517.

RUSSO-CHINESE BANK, a Corporation, Plaintiff,
vs.
NATIONAL BANK OF COMMERCE OF SEATTLE, Defendant.

Order Extending Time Within Which to File Bill of Exceptions.

Application having been made by Plaintiff for an extension of time within which to prepare and serve its proposed Bill
235 of Exceptions in this case, and it appearing that the verdict in this cause was returned on the 29th day of February, A. D. 1912, and it further appearing that the parties have stipulated that plaintiff's time be enlarged and extended for such purpose until the 15th day of April, A. D. 1912;

It is therefore ordered That Plaintiff may have until the said day in which to file and serve its proposed Bill of Exceptions.

Done in open Court this Sixth day of March, A. D. 1912.

C. H. HANFORD,
Judge of Said Court.

Indorsed: Order for extension of time within which to file Bill of Exceptions. Filed in the U. S. District Court, Western Dist. of Washington, Mar. 6, 1912. A. W. Engle, Clerk. By S., Deputy.

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 1517.

RUSSO-CHINESE BANK, a Corporation, Plaintiff,
vs.
NATIONAL BANK OF COMMERCE OF SEATTLE, Defendant.

Stipulation.

It is hereby stipulated and agreed by and between the above-named plaintiff by its attorneys, Messrs. T. L. Stiles, Warren Gregory and C. W. Door and the above-named defendant by its attorneys, Kerr & McCord and E. S. McCord, that an order may be entered in the above-entitled cause extending the time within which the defendant herein may propose amendments to the Bill of Exceptions heretofore served in the above-entitled cause, for a
236 period of ten days over and above the time allowed by law and that the said extension shall be up to and including the 2nd day of May, 1912, and that said Bill of Exceptions may be settled and signed at any time thereafter.

Dated this the 18th day of April, A. D. 1912.

T. L. STILES,
CHICKERING & GREGORY,
DORR & HADLEY,
Attorneys for Plaintiff.
KERR & McCORD,
E. S. McCORD,
Attorneys for Defendant.

Indorsed: Stipulation. Filed in the U. S. District Court, Western Dist. of Washington, April 23, 1912. A. W. Engle, Clerk. By S., Deputy.

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 1517.

RUSSO-CHINESE BANK, a Corporation, Plaintiff,
vs.
NATIONAL BANK OF COMMERCE OF SEATTLE, Defendant.

Order.

It appearing to the Court that the parties hereto have entered into a stipulation providing that the defendant may have ten days over and above that allowed by law within which to file its proposed amendments to the Bill of Exceptions herein, it is now by the Court

Ordered That the above-named defendant be, and it is hereby given up to and including the 2d day of May, 1912, within which to serve its proposed amendments to the Bill of Exceptions herein.

Done in open Court this the 23d day of April, A. D. 1912.

C. H. HANFORD, *Judge*.

237 Indorsed: Order. Filed in the U. S. District Court, Western Dist. of Washington, April 23, 1912. A. W. Engle, Clerk. By S., Deputy.

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 1517.

RUSSO-CHINESE BANK, a Corporation, Plaintiff,
vs.
NATIONAL BANK OF COMMERCE OF SEATTLE, Defendant.

Stipulation.

It is hereby stipulated and agreed by and between the above-named plaintiff by its attorneys, Messrs. T. L. Stiles, Warren Gregory and C. W. Dorr, and the above-named defendant by its attorneys, Kerr & McCord and E. S. McCord, that an order may be entered in the above-entitled cause extending the time within which the defendant herein may propose amendments to the Bill of Exceptions heretofore served in the above-entitled cause for a period of twenty days over and above the time allowed by law and that the said extension shall be up to and including the 12th day of May, 1912; and that Bill of Exceptions may be settled and signed at any time thereafter.

Dated this the 18th day of April, A. D. 1912.

T. L. STILES,
CHICKERING & GREGORY,
DORR & HADLEY,
Attorneys for Plaintiff.
KERR & McCORD,
E. S. McCORD,
Attorneys for Defendant.

Indorsed: Stipulation. Filed in the U. S. District Court, Western Dist. of Washington, May 2, 1912. A. W. Engle, Clerk. By S., Deputy.

238 In the District Court of the United States for the Western District of Washington, Northern Division.

No. 1517.

RUSSO-CHINESE BANK, a Corporation, Plaintiff,
vs.
NATIONAL BANK OF COMMERCE OF SEATTLE, Defendant.

Order.

It appearing to the Court that the parties hereto have entered into a stipulation providing that the defendant may have twenty days over and above that allowed by law within which to file its proposed amendments to the Bill of Exceptions herein, it is now by the Court

Ordered That the above-named defendant be, and it is hereby given up to and including the 12th day of May, 1912, within which to serve its proposed amendments to the Bill of Exceptions herein.

Done in open Court this the 2d day of May, A. D. 1912.

C. H. HANFORD, *Judge.*

Indorsed: Order. Filed in the U. S. District Court, Western Dist. of Washington, May 2, 1912. A. W. Engle, Clerk. By S., Deputy.

239 In the District Court of the United States for the Western District of Washington, Northern Division.

No. 1517.

RUSSO-CHINESE BANK, a Corporation, Plaintiff,
vs.
NATIONAL BANK OF COMMERCE OF SEATTLE, Defendant.

Order Settling Bill of Exceptions.

This cause having been brought on regularly before the Court on the 17th day of June, 1912, on the application of the plaintiff for the settling and certifying of its proposed Bill of Exceptions lately filed herein, as amended by the substitution of the testimony of A. T. Short and W. S. Davidson (deposition) in full in the place of pages 167 to 208, of the original Bill of Exceptions on motion of Defendant's Attorneys.

Now, therefore, on motion of plaintiff's attorneys,

It is ordered that the said proposed Bill of Exceptions heretofore filed in this cause with the amendment as above stated, as the same is now signed, be, and the same is hereby settled as the true Bill of Exceptions in this cause, and that the same, as so settled, be now and here certified accordingly by the undersigned Judge of this court, presiding at the trial of this cause, and that the said Bill of Exceptions so certified be filed by the Clerk.

C. H. HANFORD, *Judge.*

COPY BOUND TO

Indorsed: Order Settling Bill of Exceptions. Filed in the U. S. District Court, Western Dist. of Washington, June 17, 1912. A. W. Engle, Clerk. By S., Deputy.

240 In the District Court of the United States for the Western District of Washington, Northern Division.

No. 1517. (Circuit.)

RUSSO-CHINESE BANK, a Corporation, Plaintiff,
vs.
NATIONAL BANK OF COMMERCE OF SEATTLE, Defendant.

Petition for Writ of Error.

The above-named plaintiff, Russo-Chinese Bank, a corporation, feeling itself aggrieved, by order of the Court and the judgment entered against it in this cause June 18, 1912, comes now by its attorneys and petitions this Court for an order allowing it to prosecute a Writ of Error in the Honorable United States Circuit Court of Appeals for the Ninth Circuit, under and in accordance with the laws of the United States in that behalf made and provided, and that an order be made fixing the amount of security which plaintiff shall give and furnish upon said Writ of Error, conditioned as required by law as in cases where a supersedeas and stay of execution are desired.

Dated this 5th day of July, 1912.

T. L. STILES,
CHICKERING & GREGORY,
DORR & HADLEY,
Attorneys for Plaintiff.

Endorsed: Petition for Writ of Error. Filed U. S. District Court, Western District of Washington, July 5, 1912. A. W. Engle, Clerk. By S., Deputy.

241 In the District Court of the United States for the Western District of Washington, Northern Division.

No. 1517. (Circuit.)

RUSSO-CHINESE BANK, a Corporation, Plaintiff,
vs.
NATIONAL BANK OF COMMERCE OF SEATTLE, Defendant.

Order Allowing Writ of Error and Fixing Amount of Supersedeas Bond.

The plaintiff having this day filed its petition for a Writ of Error from the judgment entered herein June 18, 1912, to the United

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States Circuit Court of Appeals for the Ninth Circuit, together with an Assignment of Errors, all in due time, and praying that an order be made fixing the amount of security which plaintiff shall furnish on said Writ of Error, and that upon the giving of said security all proceedings in this Court be stayed pending the determination of said Writ of Error; it is hereby ordered that a Writ of Error herein is hereby allowed to have said judgment reviewed in the United States Circuit Court of Appeals for the Ninth Circuit; and it is further ordered that upon the plaintiff, Russo-Chinese Bank, filing with the Clerk of this Court a good and sufficient bond in the sum of Five Hundred ($500.00) Dollars, to the effect that if said plaintiff and plaintiff in error, Russo-Chinese Bank, shall prosecute the said Writ of Error to effect, and answer all damages and costs if it fails to make its plea good, then the said obligation to be void; otherwise to remain in full force and virtue. Said bond to be approved by the Court, and all further proceedings in this Court be, and are hereby suspended and stayed until the determination of the said Writ of Error by the Honorable United States Circuit Court of Appeals for the Ninth Judicial Circuit.

Dated at Seattle, the 5th day of July, 1912.

C. H. HANFORD, *Judge.*

242 Endorsed: Order Allowing Writ of Error and Fixing Bond. Filed U. S. District Court, Western District of Washington. July 5, 1912. A. W. Engle, Clerk, By S., Deputy.

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 1517. (Circuit.)

RUSSO-CHINESE BANK, a Corporation, Plaintiff in Error,
vs.
NATIONAL BANK OF COMMERCE OF SEATTLE, Defendant in Error.

Bond.

Know all men by these presents: That we, the Russo-Chinese Bank, a corporation, as principal, and American Bonding Company of Baltimore, as sureties, are held and firmly bound unto the National Bank of Commerce of Seattle, defendant above-named, in the sum of Five Hundred ($500) Dollars, to be paid to the said National Bank of Commerce of Seattle, its successors and assigns, to which payment well and truly to be made we bind ourselves, and each of us, jointly and severally, and our, and each of our successors, representatives and assigns, firmly by these presents.

Sealed with our seals and dated the 5th day of July, A. D. 1912.

Whereas, plaintiff above-named has sued out a Writ of Error to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment entered by the above-named Court in favor

of defendant and against plaintiff in the sum of One Hundred and 30-100 Dollars, June 18, 1912.

Now therefore, the condition of this obligation is such that the above-named plaintiff shall prosecute said Writ of Errors
243 to effect, and answer all costs and damages if it shall fail to make good its plea, then this obligation shall be void; otherwise shall be and remain in full force, virtue and effect.

Witness our seals and names hereto affixed the 5th day of July, 1912.

RUSSO-CHINESE BANK,
By T. L. STILES, *Its Attorney.*
[SEAL.] AMERICAN BONDING COMPANY OF BALTIMORE.
By L. N. HANSEN, *Attorney in Fact.*

Approved July 5, 1912.

C. H. HANFORD, *Judge.*

Endorsed: Bond. Filed U. S. District Court, Western District of Washington, July 5, 1912. A. W. Engle, Clerk, By S., Deputy.

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 1517. (Circuit.)

RUSSO-CHINESE BANK, a Corpora-, Plaintiff,
vs.
NATIONAL BANK OF COMMERCE OF SEATTLE, Defendant.

Comes now the plaintiff, Russo-Chinese Bank, and files the following Assignment of Errors upon which it will rely in the prosecution of its Writ of Error in the above-entitled cause.

I.

That the trial court erred in overruling the objection of counsel for plaintiff in error to the questions asked the witness R. R. Spencer upon cross-examination by counsel for defendant in error as to the customs and commercial usage among bankers with regard
244 to the return of the documents when drafts are protested, and which said questions, answers and objections are as follows:

1. "Q. Now, Mr. Spencer, counsel has directed your attention to the letter of January 9/22, 1904, addressed by the Russo-Chinese Bank to the National Bank of Commerce, in which there are certain printed sections beneath the letter or in the letter, in which it is stated that 'Unless otherwise instructed, bills of any description sent to us for procuring acceptance or for collection will be protested both for non-acceptance or non-payment and immediately returned to the sender.' Regardless of that provision which I have just read to you, I will ask you what the custom is among bankers, and what

is the commercial usage among bankers, with regard to the return of the documents when drafts are protested, or otherwise?" (Trans. p. —.)

To which question counsel for plaintiff in error objected upon the ground that there was no occasion for the introduction of any usage or custom; that the transaction in the case was a definite contract, formed by letters which said that the documents should be delivered as against the payment; that there was no doubt or ambiguity concerning the matter, and, therefore the custom or usage was not admissable.

This objection was overruled and an exception allowed plaintiff.

Thereupon the witness answered (Trans. p.—):

"A. They are supposed to protest the draft for non-acceptance and non-payment and it is customary where large amounts are involved, to cable the fact that the draft has been protested for non-acceptance or non-payment. No cablegram was sent to us regarding that matter from Port Arthur."

2. Thereupon counsel for defendant asked said witness the following question: (Trans. p. —)

"Q. I want to call your attention to the second sub-division of the printed matter contained on the letter to which I have just referred, which reads as follows: 'When sending us for collection documentary bills or only documents, clearly state in your
245 letter accompanying same whether in case of dishonor—(*a*) both bill and documents are to be promptly returned with the relative deed a protest, or (*b*) if the bill is to be returned and the relative documents are to be kept here at your disposal, or (*c*) if the goods are to be stored by us and fire insurance is to be covered pending receipt of your instructions.'

I will ask you, Mr. Spencer, to state what the commercial usage among bankers is, between the forwarding bank and the collecting bank, as to the duty or custom of the collecting bank to return the documents upon the dishonor of the draft, either for non-payment or for non-acceptance, and the documents accompanying them.

To which question counsel for plaintiff also objected upon the ground that it was not a proper subject for custom, and that the contract specifically and directly provided what was to be done.

The Court thereupon stated:

"I take it that you mean by 'custom' the course of business."

Counsel for Defendant: "That is all."

The Court: "And I think it is proper to explain to the jury the course of business as bankers understand it."

Counsel for Defendant: "That is exactly what I am trying to do."

The Court thereupon overruled the objection and an exception was allowed plaintiff.

Thereupon the witness answered:

"A. They will hold all documents until they receive an answer. It is ordinarily customary for them to hold the draft and documents until they can receive advice, especially the bills of lading, in order that they may be able to take action in regard to the goods. I am speaking now in any event that they cable us we would give them

specific instructions as to what to do. The reason those instructions are not included in our letter is from the fact that we never know what contingency may arise, consequently we leave it to their judgment to take such steps in the event of any contingency as they would take to protect their own property, by advising us."

Whereupon counsel for plaintiff said:

"We ask that that portion of the answer commencing with
246 'the reason' to the end go out as not responsive to the question and as incompetent, irrelevant and immaterial."

This motion to strike out was denied by the trial court and an exception allowed to plaintiff.

3. Thereupon counsel for defendant asked the said witness the following question: (Trans. p. —.)

"Q. In the absence of instructions, what is the commercial usage in regard to the return of the documents? Suppose there is no telegraphic communication, they don't advise of the fact of the dishonor, the forwarding bank knows nothing about it, what is the duty of the bank upon the dishonor of the paper, and what is the custom in regard to the return of the draft and the documents?"

To which question counsel for plaintiff made the same objection as hereinbefore stated, which objection was overruled by the trial court and an exception allowed the plaintiff.

Thereupon the witness answered:

"A. The custom would be to return the draft—protest and return the draft, either for non-acceptance or non-payment, as the case might be."

4. Thereupon counsel for defendant asked the said witness the following question: (Trans. p. —.)

"Q. What would become of the documents?

A. The documents would be held and probably used in the matter of storing the goods. They would be compelled—should they store the goods and take such steps as might be necessary to protect our interest, the documents might have to be delivered to the steamship company or used in the storage of the goods. The draft would be protested and returned and should be protested and returned promptly."

5. Thereupon counsel for defendant asked the said witness the following question: (Trans. p. —.)

"Q. What is the custom, in case of the dishonor of a draft or non-payment, of the collecting bank, in the absence of instructions, in regard to storing and protecting the goods?"

Whereupon counsel for plaintiff objected to the said question as incompetent, irrelevant and immaterial and calling for a conclusion of law, saying that the courts have very clearly defined what the powers and duties of collecting banks are.

247 This objection was overruled by the trial court and an exception allowed plaintiff.

Thereupon the witness answered:

"A. They are expected to use diligence in taking such steps in regard to storage, insurance and so forth as they would take were the property their own and under their own immediate—and in their own immediate possession"

Whereupon counsel for plaintiff asked that the answer be stricken out as not responsive and as not stating what the custom is, and as not stating over what extent of territory the alleged custom went, or whether it would apply in this particular instance.

This motion to strike out was denied by the trial court and an exception allowed plaintiff.

6. Thereupon counsel for defendant asked said witness the following question: (Trans. p. —.)

"Q. As I take it, then, Mr. Spencer, these requirements or these suggestions that the Russo-Chinese Bank made to you as to what you should tell them when you sent the draft, what to do with it in case of dishonor, as I understand you the commercial usage would control that regardless of whether you told them to do so or not?"

To which question counsel for plaintiff objected as calling for a conclusion of law, the witness substituting his opinion for what the law says.

This objection was overruled and an exception allowed plaintiff.

The witness thereupon answered "Yes."

II.

That the trial court erred in overruling an objection to a question asked by the trial court of the witness R. R. Spencer upon redirect cross-examination as follows:

"Q. In the case of flour, Mr. Spencer, sent to a foreign country, with a draft, 30-day draft or a time draft payable at sight, attached to a bill of lading, what is the course of business as between banks with regard to the custody of the flour during the time intervening from the presentation and acceptance of the draft, if it should
248 be accepted, and the date when the payment on the draft would be due?"

Whereupon counsel for plaintiff objected to the question. The objection was overruled and an exception allowed plaintiff. The plaintiff thereupon answered:

"The goods are supposed, or are, or at least should be stored in an independent warehouse, that is, a warehouse that is free from the interference of the consignee of the goods. Ordinarily the policies of the insurance follow the draft, so that the bank has knowledge that the goods are insured. If the goods are deliverable upon acceptance and the party accepts the draft, of course he takes the bills of lading and the sending bank of the drawer assumes all liability from then on. If the drafts are payable—if the draft is drawn 'Delivery of documents on payment only' then it is the duty of the bank, so far as it can exercise it by reasonable diligence, to hold possession indirectly, by warehousemen, of those goods, until it delivers the bill of lading or the warehouse receipts which are substituted for the bill of lading."

III.

That the trial court erred in overruling the objections to the questions asked by counsel for defendant of the witness R. R. Spencer, when recalled for re-cross-examination, to the effect that

if the goods were house- in an independent warehouse the witness would not consider it the custom of bankers to look after that shipment; and further that if there were anything to excite the suspicion of the collecting bank, what would be the custom of the bank; to all of which questions counsel for plaintiff objected as not proper cross-examination and assuming a state of facts which were not proven to have existed, to-wit, that there was any reason for suspicion on the part of the bank at Port Arthur, to which rulings exception- were allowed plaintiff.

IV.

That the trial court erred in overruling the objection of plaintiff to a question asked by defendant of the witness, William S. Davidson, as follows:

249 "Q. What is the custom of banks with reference to presenting drafts for acceptance?"

To which counsel for plaintiff objected as follows:

"Now, may it please the Court, we desire to object to that question as incompetent, irrelevant and immaterial, upon two grounds: First, that there is no reason for the Court to now invoke any custom or usage, because the contract in this case is clear and specific and direct; in other words, there is no necessity for an implied contract, because there is an express one; and, upon the second ground, that the question does not refer to the conditions prevailing in this case, because it does not ask with reference to presenting drafts for acceptance there, sent as against payment, but it asks generally as to drafts for acceptance. Now, of course there may be one custom of bankers concerning one sort of a draft and another concerning the other kind of a draft, but to invoke now a custom generally and say that it applies to this case is, we submit, utterly incompetent, irrelevant and immaterial."

The objection was overruled and exception noted; thereupon the witness answered as follows:

"As soon as the bank receives the draft it is customary for them to request the drawee to accept it, either by asking the drawee to come to the bank, or sending it around to his office."

V.

That the trial court erred in overruling the objection to the question asked the witness Davidson by defendant, as follows:

"What is the established custom among bankers at Oriental ports with reference to the handling of drafts with bill of lading and documents attached, when the drafts are in their hands for collection?"

This objection was upon the ground that there was no pleading concerning the matter and that the question did not state whether the draft referred to authorized the bank to turn the bill of lading over when the draft was accepted, or whether it instructed the bank to retain the bill of lading until it was paid.

250 Which objections were overruled and exception allowed plaintiff.

In connection with this question the following took place: Counsel for plaintiff:

"I do not want to seem unduly insistent, Your Honor, and therefore I shall not further take up the time of the Court and jury with this matter, because we have our exception, but I simply wish to again assert that I do not think counsel can find any authority which says that where there is a precise contract expressed, as there was here, that custom or usage can ever be invoked when that contract is not ambiguous. That is my understanding of the law.

The Court: I will give an instruction like that to the jury in this case."

Counsel for Plaintiff: "Then, if Your Honor please, if that is so, and the contract in this case is not ambiguous but is precise, the testimony is not admissible.

The Court: It may go in as a part of the res gestæ—of the circumstances of the transaction."

Counsel for Plaintiff: "Note an exception.

The Court: Exception allowed."

Thereupon the witness answered as follows:

"The custom of the Russo-Chinese Bank at Port Arthur was to see that the cargo was stored and insured, and the managers of the Russo-Chinese Bank have frequently come into the office of Clarkson & Co. to ascertain if certain cargo was properly stored and have taken out fire insurance with some of the fire insurance companies for which Clarkson & Co. acted as agents on such cargo."

Counsel for Plaintiff: "We ask now, first, that the answer go out, as incompetent, irrelevant and immaterial—the entire answer, and then we specifically ask that that portion of the answer which begins with the words 'and the managers of the Russo-Chinese Bank have frequently come to the office of Clarkson & Company' down to the end of the sentence, be stricken out as not responsive to the question and as being no evidence of a custom."

Counsel for Defendant: "It is clearly responsive to the question.

251 The Court: Motion to strike is denied."

Counsel for Plaintiff: "We note an exception."

VI.

The trial court erred in overruling the objection of plaintiff to the question asked the witness Davidson, as follows:

"In transactions taking place between the firm of Clarkson & Company at Port Arthur and the branch of the Russo-Chinese Bank at Port Arthur, were these customs strictly observed."

The objection to this question was upon the ground that such custom of not observing a custom was not pleaded and that the practice referred to in the question must be diametrically opposite to the custom pleaded in the answer, and that it is impossible that

a custom existed if the practice was contrary to it. This objection was overruled and exception allowed plaintiff. The witness thereupon answered that the custom was not strictly observed, as the Russo-Chinese Bank at Port Arthur allowed Clarkson & Company to have the bills of lading and other documents attached to the draft before the draft was paid.

The trial court also erred in denying the motion of plaintiff to strike out from the last answer of the witness that portion which followed the word "allowed," upon the ground that that portion of the sentence was not responsive to the question and that it was not pleaded, to which ruling on said motion an exception was taken.

VII.

That the trial court erred in overruling the objection to the question asked the witness Davidson:

"Why would the bank permit this to be done by Clarkson & Company."

The objection to this question being upon the ground that it was incompetent and a cross-examination of defendant's own witness. The objection being overruled, and exception noted, the witness answered that it was because the firm of Clarkson & Co. was established at the instigation of the Russo-Chinese Bank.

252

VIII.

That the trial court erred in denying the motion of plaintiff to strike out from the last aforesaid answer of the witness Davidson all that portion which followed the words "Mr. Clarkson went to Vladivostok," as not being responsive to the question, which motion to strike out was denied and an exception allowed plaintiff.

IX.

That the trial court erred in overruling the objection of plaintiff to the questions asked the witness Davidson by defendant concerning the custom and practice and course of dealing between the Russo-Chinese Bank and Clarkson & Co. at Port Arthur and to the answers thereto, to which rulings exceptions were allowed plaintiff.

X.

That the trial court erred in denying the motion of plaintiff to strike out from the answer of the witness Davidson to Direct Interrogatory 33 the following portion:

"On or about the 15th of February, 1904, the Russo-Chinese Bank did consent to the sale of the flour ex steamship 'Hyades,' if that is the name of the steamer that arrived at Port Arthur on or about the 8th day of February, 1904."

This motion to strike out being upon the ground that the same was not responsive to the question and that it now appeared in the case by stipulation that the Hyades arrived at Port Arthur on January 17th.

XI.

That the trial court erred in denying the motion of plaintiff to strike out from the answer of the witness Davidson to Direct Interrogatory 56 that portion thereof to the effect that if the draft was not paid by Ginsburg & Company, then it was the fault of the Russo-Chinese Bank. This motion was made upon the ground that the witness had already stated that he did not know whether the draft was paid or not, and to which ruling an exception was allowed plaintiff.

253 XII.

The trial court erred in overruling the objection to the question asked the witness A. T. Short, as follows:

"Now, in all your dealings with the Russo-Chinese Bank in handling the other shipments of the Centennial Mill Company I will ask you what arrangements if any was made with the bank in regard to the handling of this flour?"

This question was objected to upon the ground that it was not binding in the special case, and to the order overruling such objection an exception was allowed plaintiff. The witness thereupon stated the rule that Clarkson always gave the bank a letter of guaranty.

XIII.

The trial court erred in denying the motion of plaintiff to strike out the answer of the witness Short to the following question asked by defendant:

"Did they know that Clarkson & Co. were in possession of the 'Hyades' flour or thirty-six thousand sacks?"

To which the witness answered:

"They could not help but know it."

XIV.

The trial court erred in denying the motion of plaintiff to strike out from the answer of the witness Short in response to the question "Who told them," the following:

"I would tell them or Davidson would tell them. The object of getting a ninety days' sight draft was that we could get delivery without payment, but that we paid the money as soon as we got it. As soon as the flour was sold the money was collected in."

Said motion to strike out being directed to all that portion of the answer beginning with the words "The object." and which said motion was denied and exception allowed plaintiff.

XV.

The trial court erred in giving the following instructions to the jury, to each and every of which an exception was taken by plaintiff:

254 1. "I should say that the bill of lading called for the delivery of the flour to the order of the consignor, the Centennial Mill Company, and when the bill of lading was endorsed in blank and delivered with the draft to the National Bank of Commerce, that vested in the National Bank of Commerce the title, the ownership of the flour. Delivery of a bill of lading drawn as this one was is the title the same as a deed to a piece of property, a bill of sale, it amounted to a conveyance of the title to the holder of the bill of lading endorsed in blank. Delivery of the bill of lading was a symbolical delivery of possession merely while the flour was in the ship, and the warehousemen, after it had been landed and placed in a warehouse at Port Arthur, were bailees for the owner. The owner was the holder of the bill of lading and in law is deemed to be in possession as owner of the property. The National Bank of Commerce endorsed the draft so as to make it payable to the Russo-Chinese Bank at Port Arthur, and transmitted the draft thus endorsed with the other documents attached, to the Russo-Chinese Bank at Port Arthur, and it was received there by that bank. When the Russo-Chinese Bank at Port Arthur received the draft and the accompanying documents endorsed as they all were, and undertook the business of presenting and collecting the draft, it became invested with the title and ownership of the flour as to all of the world except the National Bank of Commerce of Seattle; it had the legal right to sell and dispose of that flour and to receive the proceeds subject to its duty as an agent to account to the National Bank of Commerce for it. In receiving the documents and undertaking the business in that manner, without special instruction in regard to the care of the flour and the protection of the National Bank of Commerce, it was left free to deal with the flour as an owner might."

2. "It was authorized to do whatever was necessary in the manner of incurring expense, which would be chargeable against the property, and to be compensated out of the property in its hands, and it was required to deal with the property in the same way that an intelligent and prudent owner of property would deal with his own property, to act for and in place of the National Bank of Commerce in handling the business there at Port Arthur as the National
255 Bank of Commerce would have acted if it had been there, and in a position to act for itself. As the agent for the owner it was obligated to account for the amount of the draft, to account for the security which the bill of lading constituted, and it cannot be excused from obligation to account by saying that the flour disappeared without its knowledge, and require the defendant in this case in order to fasten an obligation upon it, to prove that it was negligent. A principal does not have to prove those things in regard to property or valuables that go into the hands of an agent; the agent must render an account in order to be cleared of obligation and liability. That is the rule that is to be applied in this case in determining whether the plaintiff in this case paid out money

which it was not obligated to pay to the defendant on account of the draft."

3. "If the bank at Port Arthur neglected its obligations or failed to perform its obligations in regard to presentation and demand of payment and protest and giving notice, then it became liable to the defendant for the amount of the draft and for all that it received from the plaintiff bank in the case. If so liable, the plaintiff bank has no right of action now to get the money back that it did pay to meet that liability."

The objection to this instruction being that it stated the plaintiff became liable for the full amount of the draft, and not only for the amount of the damage actually suffered.

4. "The burden of proof rests upon the plaintiff in this action to establish by a fair preponderance of the evidence * * * that the plaintiff had not rendered itself liable to the defendant by permitting Clarkson & Company to appropriate the flour covered by the bill of lading securing the draft, and unless the plaintiff established by a fair preponderance of evidence the fact that such payment was not made by Clarkson & Company prior to the date of the payment of the money in controversy by the plaintiff to the defendant, and that the plaintiff had not rendered itself liable by permitting Clarkson & Company to sell the flour prior to the payment of the draft, then I instruct you that the plaintiff cannot recover in this action and your verdict must be for the defendant."

5. "The draft above mentioned, the bill of lading, and the insurance policies, were indorsed in blank and sent by the Na-
256 tional Bank of Commerce of Seattle to the Russo-Chinese Bank at Port Arthur, with instructions to deliver the collateral, or documents, upon the payment of the draft. By virtue of these endorsements and transfers the legal title to the draft and the documents and to the flour in question passed to and became vested in the Russo-Chinese Bank, and I instruct you that as a matter of law it was in the power of the plaintiff to handle, control, sell and dispose of such flour in any way that was deemed expedient by the plaintiff."

6. "If you find from the evidence in this case that plaintiff permitted Clarkson & Company to take over the flour under such an arrangement as the defendant claims with the stipulation that the plaintiff was the owner of the flour and with the agreement that Clarkson & Company would account to the plaintiff for the proceeds of the sale of the flour, then I instruct you that such action on the part of the plaintiff constitutes in law a payment of the draft in question and the plaintiff cannot recover and your verdict must be for the defendant."

7. "If you find from the evidence in this case that the plaintiff failed to protest the draft in question for nonpayment after its maturity, as required by law, as I have defined the law to you, then I instruct you that such failure on the part of the plaintiff to protest the draft in question would operate to release the Centennial Mill Company, the drawer of the draft, from any liability thereon, and that the defendant would be materially injured by reason of such

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failure on the part of the plaintiff to have protested the draft at its maturity, by so releasing the drawer of the draft from liability to the defendant, and the plaintiff cannot recover and your verdict must be for the defendant."

XVI.

That the trial court erred in refusing to give the following instructions requested by the plaintiff, and to each of such refusals an exception was noted by plaintiff:

1. "That the evidence shows, without contradiction, that such draft had not been paid, and I therefore instruct you to find a verdict in favor of the plaintiff for the above amount with
257 interest at the rate of six per cent per annum on $36,113.70 of said sum from November 9, 1904, and on $2,298.49 of said sum from December 16, 1904.

2. "By the decision of the Court of Appeals in this case, 187 Fed. 80, it has been made the law of the case that the complaint states a cause of action, both upon an implied and express contract; that a showing to support the implied contract was made prima facie that the money was paid under a mistake of fact.

The payment was made entirely upon the belief of both parties to the transaction that the draft had been paid to the Port Arthur branch. This belief was admittedly erroneous, and therefore plaintiff becomes entitled to its money, as a matter of law."

3. "I charge you that the Russo-Chinese Bank in this case, in acting as the collecting bank of the draft in question, and as the agency to transmit the documents in question, was bound to use only reasonable and ordinary care and diligence in the exercise of this relationship. In the absence of special instructions, it was not obliged to insure the flour or see that the same was stored, or to make any inquiries concerning the custody and disposition of the flour. In the absence of special instructions its sole responsibility, as such collecting bank, was to preserve the documents safely, to promptly present the draft for acceptance, and upon non-payment, to protest the same.

The evidence in this case shows that the Russo-Chinese Bank did comply with all of the foregoing obligations imposed upon it by its relation, and that there were no special instructions given it by the National Bank of Commerce of Seattle, except to hold the documents against payment, which the Russo-Chinese Bank did. I therefore instruct you that there is no evidence of negligence against the Russo-Chinese Bank, so far as the disposition of the flour was concerned."

4. "A collecting bank, in the absence of special instructions, has no responsibility concerning the goods. Its sole obligation is with the documents."

5. "In this case, it appears that prior to the draft in question having been sent by the defendant Bank to the plaintiff, the defendant Bank had entered into an arrangement with the Cen-
258 tennial Mill Company, the drawer of the draft, by which the defendant Bank was relieved of all responsibility in connec-

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tion with said draft. I charge you that by this arrangement, the Russo-Chinese Bank, as the agent of the defendant Bank, was also relieved of responsibility to the full extent of the said agreement. That is, that the Russo-Chinese Bank, as the collecting bank, could not be held to any greater responsibility in the matter than the National Bank of Commerce of Seattle, from whom it received the draft."

6. "I charge you that, in any event, the Russo-Chinese Bank in this matter was only bound to use reasonable and ordinary care and skill. It was not bound to use any extraordinary efforts in connection with the said documents and shipment. Thus, for example, there was no duty imposed upon the Russo-Chinese Bank to investigate as to who were the agents of the steamship line at Port Arthur, or as to whether or not Clarkson & Company were the agents of the steamship line, and there was, therefore, no negligence on the part of the Russo-Chinese Bank in failing to notify the National Bank of Commerce of Seattle that Clarkson & Company were the agents of the steamship line at Port Arthur."

7. "In other words, if you believe that, under the circumstances, the Russo-Chinese Bank used reasonable care and prudence in failing to mail to the defendant, the draft in question until the 26th day of May, 1904, then such delay in no wise prejudices the right of the Russo-Chinese Bank to recover in this case. All that its officials at Port Arthur were obliged to do was to use reasonable care and diligence, and if you believe that the conditions there at that time were such that reasonable men might differ as to the proper course to pursue, then the Russo-Chinese Bank is entitled at your hands to a wide discretion in that regard."

8. "In relation to the affirmative claims set up by the defendant, I advise you that they are as follows:

(1) That the draft in question was placed by Clarkson & Company with the plaintiff. In this connection I charge you that there is no evidence on the part of the defendant that this draft was
259 so paid, either in whole or in part, and therefore, this first affirmative defense of the defendant must be disregarded by you.

(2) The second affirmative defense relied upon by the defendant, is that the Russo-Chinese Bank did not present this draft for acceptance upon its arrival, or upon the succeeding day, and did not present the draft for acceptance for several weeks thereafter. In this connection, I charge you that the burden of proof is upon the defendant to prove that the Russo-Chinese Bank did not present such draft for acceptance upon the day of its arrival, or upon the succeeding day, and that the uncontradicted evidence in this case shows that such draft was presented for acceptance on January 23, 1904, being the day after its receipt at Port Arthur by the plaintiff. I therefore instruct you that you must disregard the second affirmative defense set up by defendant.

(3) The third affirmative defense set up by defendant in its answer, is that it was, by the custom of bankers, made the duty of the plaintiff to look after, protect and care for the flour represented by

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the bill of lading upon its arrival at Port Arthur, and that it was the duty of the plaintiff to warehouse the flour and insure the same, and that it was the duty of the plaintiff by reason of the instructions given plaintiff by defendant, and by reason of the custom among bankers, not to permit the said flour to be appropriated by Clarkson & Company, or any one else.

In this connection I charge you that there were no instructions given by defendant to plaintiff concerning the care of the flour, and that the only instructions given were to hold the documents against payment; that it was not the duty of the plaintiff to either look after, protect or care for the flour represented by the bill of lading upon its arrival at Port Arthur, or at all, and that it was not the duty of the plaintiff to warehouse the flour, or insure the same, and that it was not the duty of the plaintiff to prevent the said flour being appropriated by Clarkson & Company, or by any one else."

9. "The evidence shows that the only instructions given to plaintiff by defendant, in regard to the draft and accompanying
260 documents, was to hold them against payment. I instruct you that no custom or usage could impose additional obligations upon plaintiff in this regard than those imposed by this instruction from defendant to plaintiff. Also that defendant did not instruct plaintiff to insure or store the flour and that no custom or usage could impose this obligation upon plaintiff."

10. "If you shall believe that the Russo-Chinese Bank was negligent in any respect in regard to its duties in the premises, then I charge you that it is liable, if at all, only for such actual damages as were directly suffered by the Seattle Bank by reason of such negligence. That is, even if you believe that it was the duty of the plaintiff to insure and store this flour and take it out of the control of Clarkson & Company, but that nevertheless if plaintiff had done these things, the flour would have been lost or destroyed by reason of the war conditions at Port Arthur, then I instruct you that such negligence cannot be considered by you, but that plaintiff is entitled to recover regardless of such negligence."

11. "In relation to the payment by Clarkson & Company to the Russo-Chinese Bank of the sum of 67,000 roubles, which had been obtained from Ginsburg & Company, I instruct you that the Bank, in applying such payment, was controlled by the instructions then given it by Clarkson & Company, and that the Bank did not have any right to apply this money, or any part thereof, to any drafts, or other account, than as specifically directed by Clarkson & Company.

I furthermore instruct you that if there had been no directions given by Clarkson & Company, the Bank would not have had the right to hold the same against a draft which was not then payable.

I furthermore instruct you that the Bank had no right to accept a partial payment for the draft, and deliver the bills of lading upon such partial payment. It was the duty of the Bank to hold these documents until the draft was fully paid. The sum of 67,000 roubles was not sufficient to pay in full the draft in question, and therefore

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I instruct you that even if all this money had been paid in
261 by Clarkson & Company for the payment of this draft, the Bank would have had no right to deliver the documents until the remainder of the draft had been paid."

12. "In considering the duty of the Russo-Chinese Bank to notify the National Bank of Commerce of Seattle of the fact that Clarkson & Company were the agents of the steamship company, I instruct you that if you believe that the Russo-Chinese Bank did not, at that time, know such fact, or if you believe that the Centennial Mill Company, or its representative, did, at that time, know such fact, then there was no necessity for the plaintiff to give any notice to the defendant concerning the same

I furthermore instruct you that there was no duty imposed upon the plaintiff whatever, in connection with this transaction, until after it had received the draft in question, which the evidence shows was on January 22, 1904; that unless the Bank had special cause to believe that, at that time, Clarkson & Company were insolvent, or intended in some way to illegally remove the flour from its warehouse, there was no duty whatever imposed upon the plaintiff Bank to send any notice of these things to the defendant.

I furthermore instruct you in this connection, that if you believe that the representative of the Centennial Mill Company was present in Port Arthur during a portion of the time that this flour was in the warehouse of Clarkson & Company, and if the Russo-Chinese Bank knew that this representative was so present on the busines of the Centennial Mill Company, then there was no obligation imposed upon the Russo-Chinese Bank to give any notices or make any inquiries concerning the disposition of the flour, because it had a right to believe that all of such matters were being attended to by the representative of the Centennial Mill Company."

13. "I instruct you that the contract between the Boston Towboat Company and the Centennial Mill Company was evidenced by a contract in writing, to-wit: the Bill of Lading, and I instruct you further that such written contract could not be altered or varied by parole or oral arrangements which were not executed."

262 Wherefore the said plaintiff, plaintiff in error, prays that the judgment of the trial court be reversed and that the said trial court be directed to grant a new trial of said cause.

T. L. STILES,
CHICKERING & GREGORY,
DORR & HADLEY,
Attorneys for Plaintiff in Error, Plaintiff Below.

Indorsed: Assignment of Errors. Filed in the U. S. District Court, Western Dist. of Washington, July 5, 1912. A. W. Engle, Clerk. By S., Deputy.

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In the District Court of the United States for the Western District of Washington, Northern Division.

No. 1517. (Circuit.)

RUSSO-CHINESE BANK (a Corporation), Plaintiff in Error,
vs.
NATIONAL BANK OF COMMERCE OF SEATTLE, Defendant in Error.

Writ of Error (Original).

The President of the United States to the Honorable the Judge of the District Court of the United States for the Western District of Washington, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment upon a plea which is in the said court before you, or some of you, between the Russo-Chinese Bank, a corporation, plaintiff in error, and National Bank of Commerce of Seattle, defendant in error, manifest error hath happened, to the great prejudice of the said Russo-Chinese Bank, plaintiff in error, as by its complaint and assignment of errors appears:

We, being willing that error, if any there hath been, should
263 be duly corrected and full and speedy justice done to the parties aforesaid, in this behalf do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, on the 4th day of August, next, and within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held; that the record and proceedings aforesaid, being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, the 5th day of July, 1912.

[SEAL.]

A. W. ENGLE,
Clerk of the United States District Court for the Western District of Washington.
F. A. SIMPKINS, *Deputy.*

Indorsed: Copy. No. 1517. In the United States District Court, Western District of Washington, Northern Division. Russo-Chinese Bank, Plaintiff, vs. National Bank of Commerce, Seattle, Defendant. Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, July 5, 1912. A. W. Engle, Clerk. By S., Deputy. T. L. Stiles, Attorney for Plaintiff. Address: 410 Equitable — Tacoma, Wash. A place within the said District at which service of all subsequent papers, other than writs and process may be made.

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264 In the District Court of the United States for the Western District of Washington, Northern Division.

No. 1517. (Circuit.)

RUSSO-CHINESE BANK (a Corporation), Plaintiff in Error,
vs.
NATIONAL BANK OF COMMERCE OF SEATTLE, Defendant in Error.

Citation in Error (Copy).

The President of the United States, to National Bank of Commerce of Seattle, and Messrs. Kerr & McCord and —— De Steiguer, Attorneys:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the city of San Francisco, within thirty days from the date of this writ, pursuant to a writ of error filed in the office of the clerk of the Circuit Court of the United States for the Western District of Washington, sitting at Seattle, wherein you are defendant and defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States of America, this 5th day of July, 1912.

C. H. HANFORD, *Judge.*

Return on Service of Writ.

UNITED STATES OF AMERICA,
Western District of Washington, ss:

I hereby certify and return that I served the annexed Citation in Error on the therein-named Kerr & McCord, attorneys, by handing to and leaving a true and correct copy thereof with J. A. Kerr, a member of the firm of Kerr & McCord, attorneys, personally,
265 at Seattle, in said District, on the 12th day of July, A. D. 1912.

JOSEPH R. H. JACOBY, *U. S. Marshal,*
By FRED M. LATHE, *Deputy.*

July 12, 1912.
Fees $2.12.

Return on Service of Writ.

UNITED STATES OF AMERICA,
Western District of Washington, ss:

I hereby certify and return that I served the annexed Citation in Error on the therein-named National Bank of Commerce of Seattle

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by handing to and leaving a true and correct copy thereof with J. A. Swalwell, Vice-Pres. of the within named National Bank of Commerce of Seattle, personally at Seattle, in said District, on the 12th day of July A. D. 1912.

JOSEPH R. H. JACOBY, *U. S. Marshal,*
By FRED M. LATHE, *Deputy.*

July 12, 1912.
Fees $2.12.

Indorsed: Original. No. 1517. In the United States District Court, Western District of Washington, Northern Division. Russo-Chinese Bank, Plaintiff, National Bank of Commerce of Seattle, Defendant. Citation in Error. Filed in U. S. District Court, Western Dist. of Washington, July 5, 1912. A. W. Engle, Clerk. By S., Deputy. T. L. Stiles, Attorney for Plaintiff. Address 410 Equitable Building, Tacoma, Wash. A place within the said District at which service of all subsequent papers, other than writs and process, may be made.

266 United States District Court for the Western District of Washington, Northern Division.

No. 1517. (Circuit.)

RUSSO-CHINESE BANK, Plaintiff,
vs.
NATIONAL BANK OF COMMERCE OF SEATTLE, Defendant.

Præcipe for Transcript.

To the Clerk of the above-entitled Court:

You will please prepare Transcript in the above-entitled case on Writ of Error to the Circuit Court of Appeals and include the following:

1. Complaint.
2. Amended Answer.
3. Reply.
4. Judgment.
5. Order Extending Time to File Bill of Exceptions.
6. Bill of Exceptions.

6½. Two Orders and two Stipulations as to Amendments to Bill of Exceptions.

7. Order Settling Bill of Exceptions.
8. Petition for Writ of Error.
9. Order Allowing Writ of Error.
10. Bond.
11. Assignment of Errors.
12. Writ of Error and Copy and Proof of Service.

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13. Citation and Copy and Proof of Service.
14. Præcipe for Transcript of Record.

T. L. STILES,
DORR & HADLEY,
CHICKERING & GREGORY,
Attorneys for Russo-Chinese Bank.

267 Endorsed: Præcipe for Transcript of Record. Filed U. S. District Court, Western District of Washington, July 5, 1912. A. W. Engle, Clerk. By S., Deputy.

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 1517.

RUSSO-CHINESE BANK, a Corporation, Plaintiff in Error,
vs.
NATIONAL BANK OF COMMERCE OF SEATTLE, Defendant in Error.

Clerk's Certificate to Transcript of Record.

UNITED STATES OF AMERICA,
Western District of Washington, ss:

I, Frank L. Crosby, Clerk of the District Court of the United States for the Wstern District of Washington, do hereby certify the foregoing 271 printed pages, numbered from 1 to 271, inclusive, to be a full, true and correct copy of so much of the record and proceedings in the above and foregoing entitled cause, as is called for by præcipe of Attorney for Plaintiff in Error, as the same remain of record and on file in the office of the Clerk of said Court, and that the same constitute the return to the annexed Writ of Error.

I further certify that I annex hereto and herewith transmit the original Writ of Error and Citation.

I further certify that the cost of preparing and certifying the foregoing return to Writ of Error is the sum of $315.35, and that the said sum has been paid to me by T. L. Stiles, Esq., Attorney for Plaintiff in Error.

In testimony whereof, I have hereunto set my hand and affixed the seal of said District Court, at Seattle, in said District, this 3rd day of September, 1912.

[Seal of the United States District Court, Western District of Washington.]

FRANK L. CROSBY, *Clerk.*
By F. A. SIMPKINS, *Deputy.*

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268 In the District Court of the United States for the Western District of Washington, Northern Division.

No. 1517. (Circuit.)

RUSSO-CHINESE BANK, a Corporation, Plaintiff in Error,
vs.
NATIONAL BANK OF COMMERCE OF SEATTLE, Defendant in Error.

Writ of Error.

The President of the United States to the Honorable the Judge of the District Court of the United States for the Western District of Washington, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment upon a plea which is in the said Court before you, or some of you, between the Russo-Chinese Bank, a corporation, plaintiff in error, and National Bank of Commerce of Seattle, defendant in error, manifest error hath happened, to the great prejudice of the said Russo-Chinese Bank, plaintiff in error, as by its complaint and assignment of errors appears:

We, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid, in this behalf do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, on the 4th day of August, next, and within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held; that the record and proceedings aforesaid, being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that
269 error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, the 5th day of July, 1912.

[SEAL.]

A. W. ENGLE,
Clerk of the United States District Court
for the Western District of Washington.
F. A. SIMPKINS, *Deputy.*

Indorsed: Original. No. 1517. In the United States District Court, Western District of Washington, Northern Division. Russo-Chinese Bank, Plaintiff, vs. National Bank of Commerce, Seattle, Defendant. Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, July 5, 1912. A. W. Engle, Clerk. By S., Deputy. T. L. Stiles, Attorney for Plaintiff. Address: 410 Equitable —, Tacoma, Wash. A place within the said District at which service of all subsequent papers, other than writs and process may be made.

CLOSE IN CENTER

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 1517. (Circuit.)

RUSSO-CHINESE BANK, a Corporation, Plaintiff in Error,
vs.
NATIONAL BANK OF COMMERCE OF SEATTLE, Defendant in Error.

Citation in Error (Original).

The President of the United States to National Bank of Commerce of Seattle, and Messrs. Kerr & McCord and —— De Steigueur, Attorneys:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the city of San Francisco, within thirty days from
270 the date of this writ, pursuant to a writ of error filed in the office of the Clerk of the Circuit Court of the United States for the Western District of Washington, sitting at Seattle, wherein you are defendant and defendant in error, to show cause, if any there be, why the judgment in the said writ or error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States of America, this 5th day of July, 1912.

C. H. HANFORD, *Judge.*

Return of Service of Writ.

UNITED STATES OF AMERICA,
Western District of Washington, ss:

I hereby certify and return that I served the annexed Citation in Error on the therein-named Kerr & McCord, attorneys, by handing to and leaving a true and correct copy thereof with J. A. Kerr, a member of the firm of Kerr & McCord, attorneys, personally at Seattle, in said District, on the 12th day of July, A. D. 1912.

JOSEPH R. H. JACOBY,
U. S. Marshal,
By FRED M. LATHE, *Deputy.*

July 12, 1912.
Fees $2.12.

Return of Service on Writ.

UNITED STATES OF AMERICA,
Western District of Washington, ss:

I hereby certify and return that I served the annexed Citation in Error on the therein-named National Bank of Commerce of Seattle by handing to and leaving a true and correct copy thereof with J. A. Swalwell, Vice-Pres. of the within named National Bank of Commerce of Seattle, personally at Seattle, in said District, on the 12th day of July, A. D. 1912.

JOSEPH R. H. JACOBY,
U. S. Marshal.
By FRED M. LATHE, *Deputy.*

July 12, 1912.
Fees $2.12

271 & 272 Indorsed: Copy. No. 1517. In the United States District Court, Western District of Washington, Northern Division. Russo-Chinese Bank, Plaintiff, — National Bank of Commerce of Seattle, Defendant. Citation in Error. Filed in the U. S. District Court, Western Dist. of Washington, July 5, 1912. A. W. Engle, Clerk. By S., Deputy. T. L. Stiles, Attorney for Plaintiff. Address 410 Equitable Building, Tacoma, Wash. A place within the said District at which service of all subsequent papers other than writs and process, may be made.

273 & 274 United States Circuit Court of Appeals for the Ninth Circuit.

No. 2182.

RUSSO-CHINESE BANK, a Corporation, Plaintiff in Error,
vs.
THE NATIONAL BANK OF COMMERCE OF SEATTLE, WASHINGTON,
Defendant in Error.

Upon Writ of Error to the United States District Court for the Western District of Washington, Western Division.

Proceedings Had in the United States Circuit Court of Appeals for the Ninth Circuit.

275 At a Stated Term, to wit, the October Term A. D. 1912, of the United States Circuit Court of Appeals for the Ninth Circuit, Held in the Courtroom Thereof, in the City and County of San Francisco, in the State of California, on Wednesday, the Sixteenth Day of October, in the Year of Our Lord One Thousand Nine Hundred and Twelve.

Present: The Honorable William B. Gilbert, Circuit Judge; Honorable Erskine M. Ross, Circuit Judge; Honorable William W. Morrow, Circuit Judge.

No. 2182.

RUSSO-CHINESE BANK, a Corporation, Plaintiff in Error,
vs.
THE NATIONAL BANK OF COMMERCE OF SEATTLE, WASHINGTON, A CORPORATION, Defendant in Error.

Order of Submission.

Ordered, above-entitled cause argued by Mr. Warren Gregory, counsel for the plaintiff in error, and by Mr. E. S. McCord, counsel for the defendant in error, and submitted to the Court for consideration and decision.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 2182.

RUSSO-CHINESE BANK, a Corporation, Plaintiff in Error,
vs.
THE NATIONAL BANK OF COMMERCE OF SEATTLE, WASHINGTON, Defendant in Error.

276 *Opinion of U. S. Circuit Court of Appeals, upon Writ of Error to the United States District Court for the Western District of Washington, Western Division.*

Before Gilbert, Ross, and Morrow, Circuit Judges.

For a correct understanding of the present case it is necessary to make a full statement of the facts, as was done when the case was first here. 187 Fed. 80. On the 10th day of December, 1903, the Centennial Mill Company, of Seattle, delivered to the Boston Steamship Company, and Boston Towboat Company at Seattle, 35,312 quarter sacks of flour for shipment by the steamship "Hyades" to Clarkson & Co. at Port Arthur and/or Dalny, in Manchuria. The Centennial Mill Company received from the steamship company its bill of lading in duplicate. The bill of lading contained the following: "Received from Centennial Mill Co. * * * for shipment at Seattle, by steamship "Hyades" * * * 35,312 Qr. Sax Flour * * * to be carried by said steamer or any other steamer of the above company to the port of Port Arthur &/or Dalny * * * and to be there delivered unto shipper's order or to his or their assigns. (Notify Clarkson & Co.)"

The flour had been sold to Clarkson & Co. at Port Arthur on terms of 90 days' draft, through the Russo-Chinese Bank, at $4.10 per barrel, amounting to $36,194.80. It appears that Clarkson & Co. were merchants at Port Arthur engaged in buying and selling different kinds of goods. They were also agents at that place for

different steamship companies, including the Boston Steam-
277 ship Company and the Boston Towboat Company, and were therefore the agents of the steamship "Hyades," which carried the 35,312 quarter sacks of flour sold by the Centennial Mill Company to Clarkson & Co., to be delivered to the latter at Port Arthur. The Centennial Mill Company had made other sales of flour to Clarkson & Co., which need not be referred to in this opinion. The Russo-Chinese Bank is a banking corporation existing under the laws of the Russian Empire, with its head office at St. Petersburg, and with numerous branches throughout the empire. At the dates referred to in this case it had a branch bank at Port Arthur, Manchuria, and another at Shanghai, China. In referring to either of these banks hereafter we shall designate it by its locality.

In accordance with the terms of the sale of the flour a draft was drawn by the Centennial Mill Company on Clarkson & Co. at Port Arthur for $36,194.80, with exchange and collection charges payable in 90 days after sight to the National Bank of Commerce, at Seattle. The Centennial Mill Company procured insurance on the flour with the Fireman's Fund Insurance Company of San Francisco in the sum of $40,000. The Centennial Mill Company thereupon took this draft on Clarkson & Co., the bill of lading issued to it by the steamship company for the flour, the insurance policy issued by the Fireman's Fund Insurance Company attached thereto, and delivered the same to the National Bank of Commerce at Seattle, with whom the Centennial Mill Company regularly transacted business, and, in accordance with the customary business usage, the bank discounted the draft, and paid the mill company the value thereof.

Thereupon the bank sent the draft with the other docu-
278 ments by letter dated December 11, 1903, to the Port Arthur branch of the Russo-Chinese Bank for collection. The letter was received by the latter in due course of mail on January 22, 1904, according to the Gregorian, or "new style," calendar, or on January 9, 1914, according to the Julian, or "old style," calendar. The new style calendar prevails in this country. The old style in Russia. Under the latter the corresponding date is 13 days earlier than in this country. The dates referred to in this opinion will be according to the "new style" calendar in use in this country, and will involve a change of dates to that extent in documents issued, and transactions had in Port Arthur. The letter with its enclosures, received by the Port Arthur branch of the Russo-Chinese Bank of January 22, 1904, from the National Bank of Commerce of Seattle, was acknowledged on the same date. In this letter of acknowledgment the Port Arthur bank called the attention of the Seattle Bank to the fact that instructions were required as to the return of documents accompanying the draft if the draft should be protested for nonacceptance or nonpayment. The letter states: "Please note: (1) That, unless otherwise instructed, bills of any description sent us for procuring acceptance and/or for collection will be protested both for nonacceptance or nonpayment and immediately returned to the sender. (2) When sending us for collection documents and bills or only documents, clearly state in your letter accompanying same

whether in case of dishonor: (*a*) Both bills and documents are to be promptly returned with the relative deed of protest, or (*b*) if the bill is to be returned and the relative documents are to be kept here at your disposal, or (*c*) if the goods are to be stored by
279 us and fire insurance is to be recovered pending receipt of your instructions."

It does not appear that the Seattle Bank ever furnished the Port Arthur Bank any instructions with respect to the matters referred to in this letter. The Port Arthur Bank presented the draft to Clarkson & Co. for acceptance on January 23, 1904. It was accepted by Clarkson & Co. on January 30, 1904, and on the same date the Port Arthur Bank notified the Seattle Bank by letter of the acceptance of the draft. The acceptance of the draft on January 30, 1904, fixed its maturity on April 30, 1904. On April 28, 1904, or two days before the maturity of this draft, the Port Arthur Bank received a telegram from the Shanghai branch of the Russo-Chinese Bank making inquiry concerning a reported sale of the flour by Clarkson & Co. without paying for it. The Port Arthur Bank replied that the draft was due on the following day; that the fact that Clarkson & Co. had got possession of the flour through the bill of lading in the hands of the bank was due to Clarkson & Co. being the agents of the steamer carrying the flour and could be in no way prevented by the bank. On April 30, 1904, the draft became due, but was not paid. Under the Russian law two days' grace are allowed in the matter of the payment of bills of exchange. At the expiration of this period of grace, on May 2, 1904, the Port Arthur Bank delivered the draft to the notary public at Port Arthur for protest. On the following day, May 3, 1914, the draft was protested.

The Russo-Japanese war, formally declared February 10, 1904, was then in progress. The Japanese had been directing naval
280 operations against the Russian naval base at Port Arthur from February 9, 1904, at which date a complete blockade of Port Arthur on the water side had been effected by the Japanese fleet. About May 3, 1904, it was completed by the Japanese military forces on land, and, when the deed and protest was received by the bank from the notary, communication between Port Arthur and the outside world had been completely cut off by the besieging forces of the Japanese army. The draft with the deed of protest was thereupon placed by the Port Arthur bank in its safe to be kept until such time as communication should be restored. On January 2, 1905, the Japanese forces took possession of all the papers and documents belonging to the Russo-Chinese bank at Port Arthur, and retained possession of them until March, 1906, when they were all returned to the Russo-Chinese bank. While the books, papers, and effects of the Port Arthur bank were in the possession of the Japanese, the bank had no access to them. When they were returned to the bank, they were taken to the home office of the principal bank at St. Petersburg.

Pending this situation of affairs at Port Arthur, the Seattle bank, on July 7, 1904, wrote to the St. Petersburg bank that Clarkson had advised the Centennial Mill Company that certain drafts on Clark-

son & Co., including the one due on April 30, 1904, had been paid before maturity. To this letter the St. Petersburg bank replied to the effect that it was unable at that time to correspond with the Port Arthur bank, and was unable to trace the matter referred to, but, as soon as it was possible to investigate the subject, it would not fail to revert to it. These letters were followed by others passing between the two banks, in which the Seattle bank insisted that it had
281 information that Clarkson & Co. had paid the amount of the draft to the Port Arthur bank, and demanding payment. The St. Petersburg bank repeated its former statement that communication with Port Arthur had been suspended, and it was unable to trace the matter. Finally, on October 12, 1904, the Seattle bank concluded a letter upon the subject addressed to the St. Petersburg bank with the following: "We would respectfully request that you notify us immediately on receipt of this letter what you propose doing in the premises, and trust you will not by further delay compel us to take steps in this country to enforce our rights, which we most certainly shall do."

The St. Petersburg bank replied under date of November 9, 1904, in which, after referring to matters connected with the controversy, it said: "Of course, as the matter now stands, we are unable to discuss the question any further and therefore hand you enclosed, in cover of the bill for: U. S. $36,194.80, claimed by you, cheque on Messrs. Ladenburg, Thalmann & Co., New York, for U. S. $36,013.70, as per note at foot, receipt of which kindly acknowledge. It remains of course however understood that in case your above remittance proves not to have been paid for by Clarkson & Co. you are held responsible to refund the amount of our to-day's cheque."

The Seattle bank replied under date of December 5, 1904, acknowledging receipt of the draft for $36,013.70, but declining to accept that amount as full payment for the draft. In this letter the Seattle bank said: "The draft to this date would amount to G$38,312.19, leaving a balance due us of G$2,298.49, which we would respectfully request that you remit us by return mail. We on our part agree upon return to us of both sets of bills, showing
282 that the draft has not been paid, to reimburse you in the sum paid us, provided, that we were in no wise injured by the fact that your Port Arthur branch has indefinitely held the bills after their maturity, at which time they could have been returned to us and we could have collected from the steamship company."

To this letter the St. Petersburg bank replied under date of December 29, 1904, inclosing check for the additional amount of $2,298.49, with this statement: "It remains understood that in case your above remittance proves not to have been paid, you declare yourselves ready to refund us these $2,298.49 with the $36,013.70 sent on 27/9 November, plus accrued interest." The Seattle bank under date of January 18, 1905, acknowledged the receipt of the check for $2,298.49 with this guaranty: "We agree that guarantee contained in our letter of December 5 shall also cover this amount."

When the St. Petersburg bank received from the Japanese Government the books and documents belonging to the Port Arthur bank, it was discovered, after investigation, that Clarkson had not

paid the draft of the Centennial Mill Company; that the draft upon Clarkson & Co. had been protested, and with deed of protest had been mailed to the Seattle bank on May 26, 1904. On June 27, 1903, the St. Petersburg bank wrote to the Seattle bank the result of this investigation, and asked that the two sums of $36,013.70 and $2,298.49 which it had paid to the Seattle bank with interest from the dates of remittances be refunded to the St. Petersburg bank. After further correspondence between the banks, the Seattle bank refused to refund the money received from the St. Petersburg bank, and there-
283 upon the latter brought this action at law to recover judgment against the Seattle bank for the two sums named.

In the complaint the facts relating to the controversy were alleged substantially as has been stated, with this further allegation relating to the repayment of the two sums of money paid by the St. Petersburg bank to the Seattle bank, namely, that the payments were made upon condition "that if it should thereafter be ascertained that said drafts had not been paid the sums should be repaid to it by the defendants, to which condition defendant assented and agreed in writing."

In an amended answer the Seattle bank admitted the sending of the draft drawn by the Centennial Mill Company upon Clarkson & Co. to the Port Arthur bank for collection, the receipt of the draft by the Port Arthur bank, but denied information as to the date of its receipt or whether the draft was accepted by Clarkson & Co. or not. It admitted that during a portion of 1904 the empires of Russia and Japan were at war; alleged that the draft and protest were never returned to the defendant; admitted that it had represented to the plaintiff that the draft had been paid in full to the Port Arthur bank, that it had demanded payment of the amount of the draft in full, and that it had threatened to sue the plaintiff in the courts of the United States if the draft was not paid, that it had demanded the payment by the plaintiff to the defendant the amounts stated in the complaint, but denied that the payments had been made upon condition that, if it should thereafter be ascertained that said draft had not been paid, the said sums should be repaid to the plaintiff; denied that the defendant agreed or assented in writing or at all to
284 any such condition, but alleged that the defendant agreed upon its part upon the return to the defendant of both sets of bills and a showing that the draft had not been paid to reimburse the plaintiff with the sums paid to the defendant, provided that the defendant was in no way injured by the negligence of the plaintiff in connection with the collection of said draft, or in the performance of its duties, or in the handling of said draft or the documents connected therewith; alleged that no showing of nonpayment of said draft had ever been made, and that neither of said sets of bills or any bill had ever been returned to the defendant by the plaintiff covering the transaction referred to in the complaint, and that the plaintiff had never fulfilled or performed the conditions agreed upon by the plaintiff and defendant at the time the payments were made as alleged in the complaint.

Defendant alleged as an affirmative defense that the draft drawn by the Centennial Mill Company on Clarkson & Co. was paid in full and plaintiff received such payment in full. Defendant further

alleged as an affirmative defense that the flour represented by the bill of lading was appropriated by Clarkson & Co. to their own use and the proceeds were not applied to the payment of such draft, and that the proceeds of the sale of the flour were not used and applied toward the payment of the draft; that the failure to have the same so applied toward the payment was due to the carelessness and negligence of the plaintiff, and was due to a breach of duty that the plaintiff owed to the defendant to cause said flour or proceeds thereof to be utilized for the payment of said draft; that the plaintiff did not protest the draft at the date of its maturity, and did not return
285 the draft and the documents accompanying the same to the defendant, and all without cause or reason to the great injury and damage to the defendant.

In plaintiff's reply it denied the agreement as to the condition of the payment made by the plaintiff as alleged in defendant's answer; and denied any connection with or responsibility for the delivery of the flour to Clarkson & Co.

Upon the first trial of the cause in the court below, which was with a jury, the defendant thereto, upon the conclusion of the evidence on the part of the plaintiff, moved the Court for a nonsuit on the ground that there had been a total failure of proof to sustain the complaint, which motion the trial Court granted on the ground that the action was based upon a contract in writing and that the plaintiff had failed to prove the promise alleged in the complaint, and had failed to prove that the protested draft and accompanying documents had been returned to the defendant as alleged in the defendant's answer. This Court held that the complaint stated "a cause of action upon an implied agreement to restore money paid to the defendant in error by the plaintiff in error under a mistake of fact, and that the evidence introduced on behalf of the plaintiff tended to sustain such a cause of action," and, accordingly, reversed the judgment and remanded the cause for a new trial. Upon the re-trial the plaintiff introduced substantially the same evidence as on the former trial, and testimony was introduced on the part of the defendant—the last trial resulting in a general verdict for the defendant and a special verdict in response to a special issue submitted to the jury at the request of the plaintiff, as follows:

286 "We, the jury in the above-entitled cause, find that the Port Arthur branch of the Russo-Chinese Bank did receive payment of the draft dated December 11th, 1903, on account of which the plaintiff made the remittance to the defendant alleged in the complaint."

Judgment followed in favor of the defendant, to which judgment the plaintiff sued out the present writ of error.

Ross, Circuit Judge, after stating the case as above:

It is manifest that if the special issue in response to which the special verdict was returned was supported by sufficient evidence, and there was no substantial error in the admission or rejection of evidence bearing on it, and the jury was not wrongly instructed in respect to that question, the judgment must be affirmed.

The record shows that the plaintiff in error requested the Court to instruct the jury among other things as follows:

"In relation to the affirmative questions set up by the defendant, I advise you that they are as follows:

"1. That the draft in question was placed by Clarkson & Co. with the plaintiff. In this connection I charge you that there is no evidence on the part of the defendant that this draft was so paid, either in whole or in part, and therefore this affirmative defense of the defendant must be disregarded by you."

* * * * * * *

The Court refused to give the instruction and submitted the issue to the jury, to which action the plaintiff reserved an exception and its counsel here insist that "there is no evidence whatever that the draft was paid."

The record shows that the plaintiff in error's Port Arthur branch caused the draft to be protested, and the plaintiff introduced
287 other evidence tending to show that it was not paid, but it is a mistake to say, as does counsel for the plaintiff in error, that there is no evidence to the contrary. We find in the evidence of the defendant's witnesses Davidson and Short, and in that of Clarkson, as well as in the circumstances of the case, much evidence upon which the special verdict might well have been based. The record shows that there had been many other similar drafts, accompanied by similar documents, sent by the Seattle bank to the Port Arthur bank for flour sold by the Centennial Mill Company, and that the plaintiff bank was familiar with the business of Clarkson & Co., and, indeed, was mainly instrumental in the establishment of that firm at Port Arthur. Clarkson & Co. also had a place of business at Vladivostok, where its main office was—Davidson during most of the times in question being its manager at Port Arthur, and Short its assistant manager there, a Mr. Ofsiankin being during all of the times in question the manager of the plaintiff bank at Port Arthur, and subsequently, and at the time of the taking of the testimony in this case, being the manager of the Vladivostok branch of the plaintiff in error. The record shows that Clarkson & Co. were the agents of the steamship company that carried the flour in question from Seattle to Port Arthur and were also importers, merchants, and insurance agents, and had one of the three warehouses at Port Arthur, all of which facts were well known to the Port Arthur bank. The flour in question was carried to Port Arthur by the ship "Hyades," which reached there about the middle of January, 1904. The evidence also shows that Clarkson & Co. were large customers of the bank. The
288 succeeding ship of the steamship company, also carrying flour among other things, reached Port Arthur about the 7th of February, 1904. Short testified, among other things, that when the "Hyades" arrived with the 35,312 quarter sacks of flour in question there were but from six to eight thousand sacks in Clarkson & Co.'s warehouse, and that when that shipment arrived he went to the Port Arthur bank on behalf of Clarkson & Co. to accept the draft drawn for the purchase price of it, and did so; that when he accepted the

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draft Mr. Ofsiankin, on behalf of the bank, authorized Clarkson & Co. to take immediate possession of the flour and sell it, and that he, Short, on behalf of that firm, gave the bank what he designates as a "letter of guaranty," and what Davidson in his deposition designates as one of "hypothecation," recognizing the flour as the property of the bank until paid for, and agreeing to pay over to the bank the proceeds thereof until full payment was made; that the letter was "the regular form of bank guaranty; it was a printed form," said the witness. And both Short and Davidson testified that what was done in the matter of the shipment here in question was in accordance with a long-established custom between the Port Arthur bank and Clarkson & Co.—Short testifying that "from the year 1900 the same rule existed. We always gave the bank a letter of guaranty against—a letter of guaranty to take delivery of the cargo and the cargo belonged to them until it was paid for, and we sold it out and deposited the money in the bank from time to time as Clarkson & Co. got it in." Davidson in his deposition corroborates the testimony of Short in that regard, and it is a most significant circumstance that
289 although it appears from the evidence that during the times it was being taken Mr. Ofsiankin was the manager of the plaintiff in error's bank at Vladivostok he was not called to contradict the testimony of Short and Davidson; nor did the plaintiff in error produce the written agreement between the parties delivered to the bank according to the testimony of those witnesses, nor in any way account for it. Short testified that upon the acceptance by Clarkson & Co. of the draft in question and the delivery by that firm to the Port Arthur bank of the documents mentioned, Clarkson & Co. took possession of the 35,312 quarter sacks of flour and that they thereupon commenced selling it and paying into the bank the proceeds thereof is a fair inference from his testimony as well as that of Davidson.

It appears from the latter's testimony that by reason of orders of the Russian military authorities he was compelled to leave Port Arthur and did so on the 17th of February, 1904. Being asked on his direct examination when the last shipment of flour from the Centennial Mill Company to Clarkson & Co. arrived at Port Arthur, he answered that it arrived there about the 8th of February, 1904, but that he could not state positively as he was not there at the time; and being asked on what steamer that flour arrived at Port Arthur, answered: "On one of the steamers operated by the Boston Steamship Company or the Boston Towboat Company, either the 'Hyades,' or the 'Pleiades' "; and being asked as to the quantity of flour that arrived by the steamer so referred to by him, answered: "Between thirty-five and forty thousand sacks." In his subsequent testimony on both direct and cross-examination the witness was evidently quite confident that the steamer that brought that flour was the
290 "Pleiades," but the flour itself, the witness distinctly testified, was sold by him before leaving Port Arthur to the firm of Ginsburg & Co., which he testified was a large Russian firm doing an extensive business with the Port Arthur bank and with its principal

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place of business at that place, and which sale he testified he had to make in order to protect Clarkson & Co. against the war conditions then prevailing. His testimony is, in part, that he arranged with Ginsburg & Co. to pay a part of the money for which he sold the flour into the Port Arthur bank and to take a draft from that company on Shanghai in his favor, which he intended to pay into Clarkson & Co.'s branch at that place; and that he took the head of the firm, Ginsburg, to the Port Arthur bank and explained to the manager of that bank the terms of the sale, to which he agreed.

Short testified that the "Pleiades" arrived at Port Arthur about the 7th of February, and that he himself left there on board of that vessel, and that not more than 1,500 or 2,000 sacks of flour were landed at Port Arthur from that ship; so that the jury might well have concluded that the thirty-five or forty thousand sacks of flour which Davidson thought were brought by the "Pleiades" was the consignment of flour that the "Hyades" carried to that port a few weeks before. As a matter of course that, and all other inconsistencies in the testimony of the various witnesses, as well as their veracity, were matters for the determination of the jury, in the light of all of the facts and circumstances of the case. Moreover, there was testimony tending to show that from the 1st of January, 1904, to November 23d of the same year, Clarkson & Co. paid into the Port
291 Arthur bank 126,928 rubles and 97 kopeks.

We are of opinion that we would not be justified in holding that there was no evidence to sustain the special finding of the jury to the effect that the amount of the draft in question was paid to the Port Arthur bank.

We are also of opinion that upon the issue of payment proof as to the course of dealing between the Port Arthur bank and Clarkson & Co. with respect to similar previous drafts between the same parties was competent, and, therefore, that there was no error in the ruling of the trial court in respect to the admission of such testimony, and finding no error in the instructions of the Court upon the question of payment, the judgment must be affirmed regardless of other questions elaborately and ably argued by counsel for the plaintiff in error, since they are immaterial in view of the special verdict.

The judgment is affirmed.

[Endorsed:] No. 2182. United States Circuit Court of Appeals for the Ninth Circuit. Russo-Chinese Bank, a Corporation, Plaintiff in Error, vs. The National Bank of Commerce of Seattle, Washington, Defendant in Error. Opinion. Filed Jul- 7, 1913. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

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292 United States Circuit Court of Appeals for the Ninth Circuit.

No. 2182.

RUSSO-CHINESE BANK, a Corporation, Plaintiff in Error,
vs.
THE NATIONAL BANK OF COMMERCE OF SEATTLE, WASHINGTON,
Defendant in Error.

Judgment U. S. Circuit Court of Appeals.

In Error to the District Court of the United States for the Western District of Washington, Northern Division.

This cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Western District of Washington, Northern Division, and was duly submitted:

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is affirmed, with costs in favor of the defendant in error and against the plaintiff in error.

It is further ordered and adjudged by this Court that the defendant in error recover against the plaintiff in error for its costs herein expended, and have execution therefor.

[Endorsed:] No. 2182. United States Circuit Court of Appeals for the Ninth Circuit. Russo-Chinese Bank, etc., vs. The National Bank of Commerce of Seattle, Wash. Judgment. Filed and entered July 7, 1913. F. D. Monckton, Clerk.

293 At a Stated Term, to wit, the October Term, A. D. 1913, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the twentieth day of October, in the year of our Lord one thousand nine hundred and thirteen.

Present: The Honorable William B. Gilbert, Circuit Judge; Honorable Erskine M. Ross, Circuit Judge; Honorable Charles E. Wolverton, District Judge.

No. 2182.

RUSSO-CHINESE BANK, a Corporation, Plaintiff in Error,
vs.
THE NATIONAL BANK OF COMMERCE OF SEATTLE, WASHINGTON,
a Corporation, Defendant in Error.

Order Allowing Petition for Rehearing.

It is ordered that the Petition of the Plaintiff in Error, filed August 6, 1913, for the rehearing of the above entitled cause be, and hereby is allowed.

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At a Stated Term, to wit, the October Term, A. D. 1913, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the ninth day of February, in the year of our Lord one thousand nine hundred and fourteen.

Present: The Honorable William B. Gilbert, Circuit Judge, Presiding; Honorable Erskine M. Ross, Circuit Judge; Honorable William W. Morrow, Circuit Judge.

294 No. 2182.

RUSSO-CHINESE BANK, a Corporation, Plaintiff in Error,
vs.
THE NATIONAL BANK OF COMMERCE OF SEATTLE, WASHINGTON, a Corporation, Defendant in Error.

Order of Submission on Rehearing.

Ordered, above-entitled cause re-argued by Mr. Warren Gregory, counsel for the plaintiff in error, and by Mr. E. S. McCord, counsel for the defendant in error, and re-submitted to the Court for consideration and decision, with leave to the plaintiff in error to file a reply-brief within twenty (20) days, and with leave to the defendant in error to reply thereto, if so advised.

At a Stated Term, to wit, the October Term, A. D. 1913, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the fourth day of May, in the year of our Lord one thousand nine hundred and fourteen.

Present: The Honorable William B. Gilbert, Circuit Judge, Presiding; Honorable Erskine M. Ross, Circuit Judge; Honorable William W. Morrow, Circuit Judge.

In the Matter of the Filing of Certain Opinions and of the Filing and Recording of Certain Judgments and Decrees of This Court.

Order Directing Filing of Opinions, etc.

295 Ordered, that each of the opinions this day rendered by the Court in the following-entitled causes be filed by the clerk, and that a Judgment or Decree in each cause be filed and recorded in the Minutes in accordance with the opinion filed therein: Russo-Chinese Bank, a Corporation, Plaintiff in Error, vs. The National Bank of Commerce of Seattle, Washington, Defendant in Error. No. 2182. * * *

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In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 2182.

RUSSO-CHINESE BANK, a Corporation, Plaintiff in Error,
vs.
THE NATIONAL BANK OF COMMERCE OF SEATTLE, WASHINGTON,
Defendant in Error.

Opinion of U. S. Circuit Court of Appeals on Rehearing.

Upon Writ of Error to the United States District Court for the Western District of Washington, Northern Division.

Before Gilbert, Ross, and Morrow, Circuit Judges.

On Rehearing.

The Court:

Further consideration of this case satisfies us of the correctness of our decision when it was last under consideration—206 Fed. 646—and for the reasons there given the judgment is affirmed.

[Endorsed:] No. 2182. United States Circuit Court of
296 Appeals for the Ninth Circuit. Russo-Chinese Bank, a Corporation, Plaintiff in Error, vs. The National Bank of Commerce of Seattle, Defendant in Error. Opinion on Rehearing. Filed May 4, 1914. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2182.

RUSSO-CHINESE BANK, a Corporation, Plaintiff in Error,
vs.
THE NATIONAL BANK OF COMMERCE OF SEATTLE, WASHINGTON,
Defendant in Error.

In Error to the District Court of the United States for the Western District of Washington, Northern Division.

Judgment of U. S. Circuit Court of Appeals on Rehearing.

This cause came on to be re-heard on the Transcript of the Record from the District Court of the United States for the Western District of Washington, Northern Division, and was duly submitted:

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this

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cause be, and hereby is affirmed, with costs in favor of the defendant in error and against the plaintiff in error.

It is further ordered and adjudged by this Court that the defendant in error recover against the plaintiff in error for its costs herein expended, and have execution therefor.

297 [Endorsed:] No. 2182. United States Circuit Court of Appeals for the Ninth Circuit. Russo-Chinese Bank, a Cor., vs. The National Bank of Commerce of Seattle, Wash. Judgment (on Rehearing). Filed and entered May 4, 1914. F. D. Monckton, Clerk.

At a Stated Term, to wit, the October Term, A. D. 1913, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Thursday, the seventh day of May, in the year of our Lord one thousand nine hundred and fourteen.

Present: The Honorable William B. Gilbert, Circuit Judge, Presiding; Honorable Erskine M. Ross, Circuit Judge; Honorable William W. Morrow, Circuit Judge.

No. 2182.

RUSSO-CHINESE BANK, a Corporation, Plaintiff in Error,
vs.
THE NATIONAL BANK OF COMMERCE OF SEATTLE, WASHINGTON, Defendant in Error.

Order Staying Issuance of Mandate Until Disposition by Supreme Court U. S. of Application for Writ of Certiorari.

Upon motion of Mr. Warren Gregory, counsel for the plaintiff in error, it is ordered that the issuance of the mandate of this Court under Rule 32 in the above-entitled cause be, and hereby is stayed until the disposition by the Supreme Court of the United States of an application to be made thereto on behalf of the plain-
298 tiff in error for the issuance of a writ of certiorari in the above-entitled cause.

COPY BOUND

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2182.

RUSSO-CHINESE BANK, a Corporation, Plaintiff in Error,
vs.
THE NATIONAL BANK OF COMMERCE OF SEATTLE, WASHINGTON, a Corporation, Defendant in Error.

Præcipe for Record for Use on Petition to Supreme Court U. S. for a Writ of Certiorari.

To the Clerk of the said Court:

SIR: Please make and issue a certified Printed Transcript of the Record for use on an Application to be made to the Supreme Court of the United States for the issuance of a Writ of Certiorari under Section 240 of the Judicial Code, in the above-entitled cause, the said Transcript to consist of the following:

1. Copy of Printed Transcript of Record on which the above-entitled cause was heard in said Circuit Court of Appeals, to which will be added a printed copy of the following entitled proceedings that were had, and of the papers that were filed in said Circuit Court of Appeals, viz:
2. Order of Submission of October 16, 1912;
3. Opinion, filed July 7, 1913;
4. Judgment, filed and entered July 7, 1913;
5. Order, of October 20, 1913, Granting Petition for Rehearing;
299 6. Order of Submission, of February 9, 1914, on Rehearing;
7. Order, of May 4, 1914, Directing Filing of Opinion and Entering of Judgment on Rehearing;
8. Opinion on Rehearing, filed May 4, 1914;
9. Judgment on Rehearing, filed and entered May 4, 1914;
10. Order Staying Mandate until disposition by S. C. U. S. of Application for Issuance of Writ of Certiorari, of May 7, 1914;
11. Præcipe for Certified Transcript of Record, etc.; and
12. Certificate of Clerk U. S. Circuit Court of Appeals to Transcript of Record.

Prepare 10 uncertified copies of said Printed Transcript of Record by printing 10 copies of the above-mentioned Proceedings, etc., and by adding one of the latter printed copies of such Proceedings, etc., to each of the 10 extra copies of the Printed Record that were lodged in said Circuit Court of Appeals, and re-bind 10 copies of the Printed Record and Printed Proceedings as customary for use on said Application for Writ of Certiorari, and certify one of the complete copies as the original certified Transcript of Record on said Application.

T. L. STILES,
WARREN GREGORY,
CHICKERING & GREGORY,
DORR & HADLEY,
Counsel for Plaintiff in Error.

TO CLOSE IN CENTER

300 [Endorsed:] No. 2182. United States Circuit Court of Appeals for the Ninth Circuit. Russo-Chinese Bank, a Corporation, Plaintiff in Error, vs. The National Bank of Commerce of Seattle, Washington, a Corporation, Defendant in Error. Præcipe for —. Filed May 19, 1914. F. D. Monckton, Clerk.

301 United States Circuit Court of Appeals for the Ninth Circuit.

No. 2182.

RUSSO-CHINESE BANK, a Corporation, Plaintiff in Error,
vs.
THE NATIONAL BANK OF COMMERCE OF SEATTLE, WASHINGTON, Defendant in Error.

Certificate of Clerk U. S. Circuit Court of Appeals to Record Certified Under Section 3 of Rule 37 of the Rules of the Supreme Court of the United States.

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing three hundred (300) pages, numbered from and including one (1) to and including three hundred (300), to be a true copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to the præcipe of counsel for the plaintiff in error, filed therefor on the nineteenth day of May, A. D. 1914, and certified under section 3 of Rule 37 of the Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the Seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this twenty-fifth day of May, A. D. 1914.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

302 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, Greeting:

Being informed that there is now pending before you a suit in which Russo-Chinese Bank is plaintiff in error and the National Bank of Commerce of Seattle, Washington, is defendant in error, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the Western District of Washington, and we, being willing for certain reasons that the said cause and the record and proceedings

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therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States,

303 Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twenty-seventh day of October, in the year of our Lord one thousand nine hundred and fourteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

304 [Endorsed:] File No. 24,364. Supreme Court of the United States, No. 620, October Term, 1914. Russo-Chinese Bank vs. National Bank of Commerce of Seattle, Washington. Writ of Certiorari. No. 2182. United States Circuit Court of Appeals for the Ninth Circuit. Filed Nov. 2, 1914. Frank D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit, by Meredith Sawyer, Deputy Clerk.

305 United States Circuit Court of Appeals for the Ninth Circuit.

No. 2182.

RUSSO-CHINESE BANK, Plaintiff in Error,
v.
THE NATIONAL BANK OF COMMERCE OF SEATTLE, WASHINGTON,
Defendant in Error.

Stipulation.

It is hereby stipulated that the transcript already filed in the Clerk's office of the Supreme Court of the United States with the petition for the writ of certiorari herein be taken as a return to said writ.

Dated this 31st day of October, 1914.

DORR & HADLEY,
T. L. STILES,
CHICKERING & GREGORY,
Attorneys for Plaintiff in Error.
KERR & McCORD,
Attorneys for Defendant in Error.

[Endorsed:] Stipulation as to return to writ of certiorari from the Supreme Court of the United States. Filed Nov. 2, 1914. Frank D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit, by (Signed) Meredith Sawyer, Deputy Clerk.

TO CLOSE IN CENTER

306 United States Circuit Court of Appeals for the Ninth Circuit.

No. 2182,

RUSSO-CHINESE BANK, a Corporation, Plaintiff in Error,
v.
THE NATIONAL BANK OF COMMERCE OF SEATTLE, WASHINGTON, a Corporation, Defendant in Error.

Certificate of Clerk U. S. Circuit Court of Appeals to Stipulation as to Return to Writ of Certiorari from Supreme Court U. S.

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the next preceding page, to be a full, true, and correct copy of a Stipulation as to Return of Writ of Certiorari from the Supreme Court of the United States, filed in the above-entitled cause on the 2d day of Nov. A. D. 1914, as the original thereof remains on file and of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 2d day of November, A. D. 1914.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MOCKTON, *Clerk.*

307 United States Circuit Court of Appeals for the Ninth Circuit.

No. 2182.

RUSSO-CHINESE BANK, a Corporation, Plaintiff in Error,
vs.
THE NATIONAL BANK OF COMMERCE OF SEATTLE, WASHINGTON, a Corporation, Defendant in Error.

Return to Writ of Certiorari.

By direction of the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, I, Frank D. Monckton, as Clerk of said Court, in obedience to the annexed writ of certiorari issued out of the Honorable the Supreme Court of the United States and addressed to the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, commanding them to send, without delay, to the said Supreme Court the record and proceedings in the above-entitled cause, do attach to the said Writ a certified copy of a Stipulation as to Return to Writ of Certiorari, the original of which stipulation was filed in my office on the second day of November, A. D. 1914, and, pursuant thereto, do hereby send the

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said certified copy of Stipulation as the Return to the said Writ of Certiorari.

In testimony whereof I have hereunto set my hand and affixed the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 2d day of November, A. D. 1914.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

[Endorsed:] 620/24364.

308 [Endorsed:] File No. 24,364. Supreme Court U. S., October term, 1914. Term No. 620. Russo-Chinese Bank, Petitioner, vs. National Bank of Commerce of Seattle, Washington. Writ of certiorari and return. Filed November 11, 1914.

TO CLOSE IN CENTER

No. 244

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1914.

RUSSO-CHINESE BANK,
Petitioner,
vs.
THE NATIONAL BANK OF COMMERCE OF SEATTLE, WASHINGTON,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

W. H. CHICKERING,
WARREN GREGORY,
GEO. H. WHIPPLE,
Attorneys for Petitioner.

Filed this ..... *day of June, 1914.*

JAMES D. MAHER, Clerk.

By ..... *Deputy Clerk.*

No.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1914.

RUSSO-CHINESE BANK,
Petitioner,

vs.

THE NATIONAL BANK OF COMMERCE OF SEATTLE, WASHINGTON,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Russo-Chinese Bank, respectfully represents that it seeks in this action to recover from the defendant the sum of $36,113.70 with interest as the aggregate of two several sums paid by petitioner to respondent on November 9, 1904, and December 5, 1904, respectively.

First. The record. The first trial of said action resulted in a judgment of nonsuit entered March 17, 1910, upon the theory that the complaint counted only upon an express promise of respondent to repay the money, and that such express promise was conditioned upon the return to respondent at Seattle of the bills of lading and the draft.

Upon the pleadings and a bill of exceptions, duly settled, the case was taken by writ of error to the Circuit Court of Appeals for the Ninth Circuit which, on April 3, 1911, reversed the judgment and remanded the case for a new trial. The opinion of the court (187 Fed. Rep. 80) contains a full and correct statement of the facts as shown at the first trial, and decided as the law of the case that the allegations of the complaint stated a cause of action upon an implied agreement to restore money paid under a mistake of fact as well as upon an express agreement to repay the money, and that the evidence submitted for the petitioner was sufficient to go to the jury.

A new trial was had before the court, Honorable C. H. Hanford presiding, sitting with a jury, which on June 18, 1912, rendered a general verdict in favor of the respondent and also a special verdict to the effect that the respondent did receive payment for the draft dated December 11, 1903.

Upon the pleadings and bill of exceptions, duly settled, the case was again taken by writ of error to the said Circuit Court of Appeals which on July 7, 1913, affirmed the judgment (206 Fed. Rep.

646) upon the sole ground that the special verdict made any other alleged error in the record immaterial. A rehearing was ordered by the Circuit Court of Appeals from this last judgment and on the 4th day of May, 1914, a second opinion was filed simply stating that the judgment was affirmed for the reasons stated in the opinion rendered on July 7, 1913.

Second. The facts. The following is a condensed statement of the facts:

The petitioner is a banking corporation created under the laws of the Empire of Russia and having a head office at St. Petersburg with numerous branches throughout the principal cities of the world, including Port Arthur.

The respondent is a banking corporation having its business at Seattle, Washington.

The Centennial Mill Company of Seattle had for some time prior to the incidents out of which this litigation arose been accustomed to send large consignments of flour to Clarkson & Co., an importing firm having its principal place of business at Vladivostok and a branch office at Port Arthur. The customary method of transacting this business was that the Centennial Mill Company would draw a draft on Clarkson & Co. for the purchase price of the flour which with the bills of lading were delivered to the respondent bank in Seattle which then discounted the draft and paid the mill company.

Then the Seattle bank would send the draft with the bills of lading and insurance policy to the Port Arthur branch of the petitioner for collection, documents to be delivered on payment. These drafts would be acknowledged by the Port Arthur branch in a recognized form of letter (Trans. p. 123) in which it was stated that specific instructions must be given concerning the disposition of the bills and documents and storage of the goods if the draft be dishonored. The Seattle bank never gave the Port Arthur branch any special instructions on this subject (p. 124).

The particular facts of this case arose out of a draft in the face amount of $36,194.80, dated December 10, 1903, and payable ninety days after sight, to pay for the shipment of 35,312 quarter-sacks of flour sent by the ship "Hyades" belonging to the Boston Steamship Company and the Boston Towboat Company. Clarkson & Co. were the agents of these steamship lines in Port Arthur. The respondent bank sent to the Port Arthur branch this draft reading as follows:

"Exchg for
G $36,194.80.

"Seattle, Washington, December 11th, 1903.

"Ninety (90) days after sight of this First of Exchange (Second unpaid) pay to the order of the National Bank of Commerce thirty-six thousand one hundred ninety-four & 80/100 dollars with exchange and collection charges, value received, and charge the same to account of

"CENTENNIAL MILL COMPANY,
"By M. Thomsen, President.

"Gold

"1 To Clarkson & Company,
"Port Arthur, China.
"No. 1559.
"Payable at the Bank's demand rate of exchange on New York at due date, together with interest at six per cent per annum from date of this bill to estimated date of return of remittance in Seattle, Washington.
"Pay Banque Russo Chinoise or order.
"THE NATIONAL BANK OF COMMERCE,
"Seattle, Washington.
"By R. R. Spencer, Cashier."

This draft with the policy of insurance and bill of lading and an invoice or bill of sale (p. 29) from the Centennial Mill Company to Clarkson & Co. were then sent by the Seattle bank to the Port Arthur branch which received them on January 22, 1904, according to the Gregorian or new style calendar, or January 9, 1904, according to the Julian or old style calendar. (The dates in accordance with the new style calendar are given hereafter.) On the same day the Port Arthur branch acknowledged receipt to the respondent bank in a letter which drew the attention of the respondent to the fact that instructions were required as to the return of documents and storage of the goods in event of dishonor of the draft. On the day after the receipt of the draft, viz., January 23, the Port Arthur branch presented the draft to Clarkson & Co. for acceptance and it was accepted on January 30th, and the respondent bank was notified by the Port Arthur branch on the same day of such acceptance. Being a ninety-day draft, its maturity

was then fixed as April 30th. The Russo-Japanese war was formally declared on February 10, 1904, although hostilities had commenced on the previous day, and from that time until Port Arthur fell on January 2, 1905, the investment of the place was complete and communication with the outside world cut off.

On April 30, 1904, the draft became due but was not paid. Under the Russian law, two days of grace were allowed and at the expiration of this period, viz., on May 2, 1904, the Port Arthur branch delivered the draft to a notary public at Port Arthur for protest and it was protested on the following day.

In this state of affairs, the Port Arthur branch retained the protested draft to ascertain if communication with the outside world would be restored; but matters not having improved and being uncertain as to the future they, on May 26, 1904 (p. 24), mailed the respondent a letter enclosing the protested draft and stating that it had been protested for non-payment. This letter also stated that the shipping documents were being retained pending receipt of instructions. The Seattle bank denies that it ever received this letter.

These facts which had transpired after Port Arthur was invested were not known to the outside world until after the fall of Port Arthur. At that time the Japanese authorities took possession of the papers and documents of the Port Arthur branch and retained them until March, 1906, when

they were returned to the petitioner. During all this time the Russo-Chinese Bank had no access to these papers.

Meanwhile the respondent bank entered into correspondence with the head office of the Russo-Chinese Bank at St. Petersburg in which the Seattle Bank insisted that it had learned that Clarkson & Co. had paid the amount of the draft to the Port Arthur bank and demanded payment. The St. Petersburg bank answered that it had had no communication with Port Arthur and was unable to trace the matter. This protracted correspondence finally culminated in a letter of October 12, 1904, in which the Seattle bank stated that if the St. Petersburg bank did not pay the money which they were informed had been paid to the Port Arthur branch, they would commence legal proceedings in the United States to enforce their rights.

The St. Petersburg Bank, being in ignorance of the facts and fearing that since their documents at Port Arthur were inaccessible they would be unable to produce any evidence in the event that such legal proceedings were instituted in the United States, paid the amounts here sued for to the respondent by check on Ladenburg, Thalmann & Co. of New York, and in the letter accompanying this check (p. 92) they said, after repeating that they had no knowledge of the conditions existing at Port Arthur:

> "It remains of course however understood that in case your above remittance proves not

to have been paid for by Clarkson & Co. you are held responsible to refund the amount of our to-day's cheque."

The Seattle bank replied, under date of December 5, 1904, acknowledging receipt of the check for $36,013.70, but calling attention to the fact that this was only for the principal of the draft, and that there was still interest, collection and exchange charges due, amounting to $2298.49 additional. In this reply letter, the Seattle bank said (p. 93):

> "* * * We on our part agree upon return to us of both sets of bills, showing that the draft has not been paid, to reimburse you in the sum paid us, provided, that we were in no wise injured by the fact that your Port Arthur Branch has indefinitely held the bills after their maturity, at which time they could have been returned to us and we could have collected from the Steamship Company."

The petitioner from its St. Petersburg head office then sent this additional payment of $2298.49 with a letter (p. 94) in which it was said:

> "* * * It remains understood that in case your above remittance proves not to have been paid, you declare yourselves ready to refund us these $2298.49 with the $36,013.70 sent on 27/9 November, plus accrued interest."

and to this letter the respondent bank, under date of January 18, 1905, replied acknowledging receipt of the payment and agreeing that the guarantee contained in their letter of December 5th should also cover this amount (p. 95).

Upon the return of the bank's papers by the Japanese, it was for the first time ascertained by the respondent that the draft had not in fact been paid but had been returned protested for non-payment in May, 1904. A demand for the repayment of the money was then made (p. 98) and the bills of lading and other documents which had remained with the Port Arthur branch pending further instructions were tendered to the respondent. After some correspondence, respondent refused repayment, and this action was commenced.

The foregoing facts are condensed from the record as stated by the Circuit Court of Appeals on the first appeal.

In addition to the foregoing evidence, which was shown by depositions, the petitioner also developed by the testimony of R. R. Spencer, manager of the respondent bank (p. 122), that it had never given any specific instructions to the Port Arthur branch concerning the custody of the flour; that the respondent bank was protected by a letter of guaranty from the Centennial Mill Company (p. 124); that upon demand, the Centennial Mill Company, on November 2, 1904, repaid, without discount, the money that it had previously been advanced on the draft, and that the Russo-Chinese Bank had never been paid anything in connection with this transaction, even for its collection charges (p. 125).

Third. The Circuit Court of Appeals in its second decision which is now sought to be reviewed,

affirmed the judgment below upon the single ground that there was some evidence to support the special verdict of the jury that the draft in question had in fact been paid to the Port Arthur branch. No other phase of the case was discussed nor are the instructions of the court covering the law concerning this fact of payment mentioned in the opinion. It is upon these instructions that your petitioner seeks this writ, and for the purpose of demonstrating their importance we now summarize the testimony concerning the payment and non-payment of this draft.

The respondent to prove that the draft had not been paid showed:

1. By the testimony of the witness Friedberg, manager of the Port Arthur branch (p. 20), that the draft had not been paid in whole or in part; that it was protested for non-payment (p. 42) on May 3, 1904, and returned with the deed of protest to the respondent bank on May 26, 1904.

2. By the witness Drozdov, a clerk in the Port Arthur branch, that the draft had not been paid in whole or in part (p. 48); that a letter (p. 50) was written from the Port Arthur branch to the notary public requesting him to protest this bill; and that this witness kept all the books of the Port Arthur branch from January 1, 1904, to December 23, 1904 (p. 54).

3. By the witness Richter, that he was an employee of the Port Arthur branch from January

1, 1904, to the end of that year, and that he kept the register of accepted checks or drafts issued by the Port Arthur branch. He testified (p. 120):

> "* * * I know for a fact that such draft has not been paid by Clarkson; that it was protested, and the bill and protest sent to the National Bank of Commerce of Seattle, but has gone astray in consequence of the war."

4. By the books of the Port Arthur branch stated by the witness Friedberg (p. 20) to have been kept correctly and to include all the transactions concerned with the collection of the draft in question. These books show (p. 46) the receipt of this draft, the date of its maturity and the collateral, and under the head of "Payment" no annotation is made but the following appears: "Draft returned 13/V-'04" which under the Gregorian calendar would be May 26, 1904.

5. By the witness Clarkson, whose firm accepted this draft, and who said (p. 115):

> "I am unable, up to the present time, to say whether I was mistaken in my statement that the draft had been paid, or not."

As against this evidence of non-payment, there is no direct testimony. The respondent had but two witnesses—Davidson (pp. 175-213) and Short (pp. 136-175).

The witness Davidson had been discharged by Clarkson & Co. early in 1904 (p. 111), because he had retained a portion of the proceeds of a cargo of flour belonging to the firm that he had

sold to Ginsburg and Company (pp. 117-118). He finally left Port Arthur on February 17, 1904 (p. 197), more than two months before the draft matured. He knew nothing of any of the circumstances in connection with this particular draft (pp. 192-194).

The witness Short testified (p. 154) that he did not have any personal knowledge concerning the payment of this draft; that he left the employ of Clarkson & Co. on February 4th (p. 153) and he finally left Port Arthur about February 14 or 15, 1904 (p. 142).

The inferential testimony relied upon by respondent to prove payment is as follows:

Short testified that when he accepted this draft, he gave the bank what he termed "a letter of guaranty" which recognized the flour as the property of the bank until paid for and which contained an agreement on the part of Clarkson & Co. to pay over to the bank the proceeds of the sales of the flour from time to time until full payment was made. He did not testify that Clarkson & Co. did in fact take possession of the flour or sell it. But the Court of Appeals on this phase of the case concluded that it was a fair "inference" that such course was taken. Such conclusion can be only a matter of inference for the reason that Short testified that he did not know what became of the "Hyades" flour. He testified (p. 160):

> "Q. Do you know whatever became of the 'Hyades' flour?

A. The 'Hyades' flour?
Q. Yes.
A. I don't.
Q. Do you know whatever became of a single sack of it?
A. No, nothing other than what I have heard them testify to.
Q. Yes, but of your own knowledge, I mean?
A. No.
Q. You don't know anything about that at all?
A. I know that was in the warehouse of Clarkson & Company.
Q. Whether or not it was ever delivered out of the warehouse to anybody you can't say?
A. I cannot say.
Q. Whether or not the bank ever got any money for the draft you cannot say?
A. No, I cannot say.
Q. Yes.
A. I don't know."

Davidson testified that a custom had existed between the Port Arthur branch and Clarkson & Co. for the latter to give the bank a letter of guaranty and that the bills of lading would then be delivered. He was particular to state that Clarkson & Co. were never allowed to take deliveries of cargoes until the bills of lading had been delivered (p. 209). It is important to here note that the custom testified to by Davidson could not have been followed in the present instance, since the bills of lading were never deliverd by the Port Arthur branch, but were produced by the plaintiff at the trial of this case.

GROUNDS AND GRAVAMEN OF AND FOR THIS PETITION FOR WRIT OF CERTIORARI.

First. Because the trial court erred in instructing the jury as follows:

> "If you find from the evidence in this case that plaintiff permitted Clarkson Company to take over the flour under such an arrangement as the defendant claims with the stipulation that the plaintiff was the owner of the flour and with the agreement that Clarkson & Company would account to the plaintiff for the proceeds of the sale of the flour, then I instruct you that such action on the part of the plaintiff constitutes in law a payment of the draft in question and the plaintiff cannot recover and your verdict must be for the defendant" (p. 228).

We respectfully urge that there is error in this instruction in that the jury were here told that upon the giving of this permission the draft must be considered as having been paid in full. The action of a pledgee in wrongfully stating to a debtor that he may take the security is declared to constitute in law a payment of the debt in full although the pledgee may never in fact have taken the goods.

This "arrangement", if perfected, could amount to nothing more than a release of the security for the debt. Such release could not be deemed to pay the debt except to the extent of the value of the security lost. Such release could not result in damage if the debtor was able to pay the draft when it matured. The instruction does not proceed upon this theory but, as noted, makes the mere

agreement to release equivalent to an immediate satisfaction of the entire debt. Thus, although the flour may never actually have been taken over by Clarkson or sold by him and indeed may be still in the warehouse, still the jury were compelled under this instruction to find that the draft was paid in full.

This instruction must construe this arrangement as a novation by which Clarkson & Co. were thereby released from the obligation on their accepted draft and a new liability under their letter of guaranty substituted therefor. Short testified that this arrangement concerning the letter of guaranty was made at the same time that he accepted the draft, and it is not permissible to assume that this acceptance was an idle act. Yet under the court's instruction the draft was paid the moment it was accepted and three months before it matured. If a new obligation had been substituted for the old, this draft would of course have been canceled and returned to Clarkson & Co.

If there be error in this instruction, the special verdict of the jury cannot render such error immaterial for the reason that it is the direct authority upon which such special verdict was rendered.

Second. Because the court erred in instructing the jury that it was the obligation of the collecting bank at Port Arthur to care for the flour without any special instructions so to do, and that the

Port Arthur branch was in law and in fact the owner of the flour; this instruction being as follows (pp. 222-223):

> "* * * The National Bank of Commerce paid to the Centennial Mill Company the amount of the draft, and that vested it with the title, the right to receive the money on that draft and the title to the flour. I should say that the bill of lading called for the delivery of the flour to the order of the consignor, the Centennial Mill Company, and when the bill of lading was endorsed in blank and delivered with the draft to the National Bank of Commerce, that vested in the National Bank of Commerce the title, the ownership of the flour. Delivery of a bill of lading drawn as this one was is the title, the same as a deed to a piece of property, a bill of sale, it amounted to a conveyance of the title to the holder of the bill of lading endorsed in blank. Delivery of the bill of lading was a symbolical delivery of possession merely while the flour was in the ship, and the water houseman, after it had been landed and placed in a warehouse at Port Arthur, were bailees for the owner. The owner was the holder of the bill of lading and in law is deemed to be in possession as owner of the property. The National Bank of Commerce endorsed the draft so as to make it payable to the Russo-Chinese Bank at Port Arthur, and transmitted the draft thus endorsed with the other documents attached, to the Russo-Chinese Bank at Port Arthur, and it was received there by that bank. When the Russo-Chinese Bank at Port Arthur received the draft and the accompanying documents endorsed as they all were, and undertook the business of presenting and collecting the draft, it became invested with the title and ownership of the flour as to all of the world except the National Bank

of Commerce of Seattle; it had the legal right to sell and dispose of that flour and to receive the proceeds subject to its duty as an agent to account to the National Bank of Commerce for it. In receiving the documents and undertaking the business in that manner, without special instruction in regard to the care of the flour and the protection of the National Bank of Commerce, it was left free to deal with the flour as an owner might. It was obligated as an agent to act in good faith to protect the rights of the National Bank of Commerce in the collection of the draft. It was authorized to do whatever was necessary in the manner of incurring expense, which would be chargeable against the property, and to be compensated out of the property in its hands, and it was required to deal with the property in the same way that an intelligent and prudent owner of property would deal with his own property, to act for and in place of the National Bank of Commerce in handling the business there at Port Arthur as the National Bank of Commerce would have acted if it had been there, and in a position to act for itself. As the agent for the owner it was obligated to account for the amount of the draft, to account for the security which the bill of lading constituted, and it cannot be excused from obligation to account by saying that the flour disappeared without its knowledge, and require the defendant in this case in order to fasten an obligation upon it, to prove that it was negligent. A principal does not have to prove those things in regard to property or valuables that go into hands of an agent; the agent must render an account in order to be cleared of obligation and liability. That is the rule that is to be applied in this case in determining whether the plaintiff in this case paid out money which it was not obligated to

pay to the defendant on account of the draft" (pp. 254-255).

And also is error claimed in the refusal of the trial court to give the following instructions requested by the petitioner:

"I charge you that the Russo-Chinese Bank in this case, in acting as the collecting bank of the draft in question, and as the agency to transmit the documents in question, was bound to use only reasonable and ordinary care and diligence in the exercise of this relationship. In the absence of special instructions, it was not obliged to insure the flour, or see that the same was stored, or to make any inquiries concerning the custody and disposition of the flour. In the absence of special instructions its sole responsibility, as such collecting bank, was to preserve the documents safely, to promptly present the draft for acceptance, and upon non-payment, to protest the same.

"The evidence in this case shows that the Russo-Chinese Bank did comply with all of the foregoing obligations imposed upon it by its relation, and that there were no special instructions given it by the National Bank of Commerce of Seattle, except to hold the documents against payment, which the Russo-Chinese Bank did. I therefore instruct you that there is no evidence of negligence against the Russo-Chinese Bank, so far as the disposition of the flour was concerned" (p. 257).

* * * * * * * *

"A collecting bank in the absence of special instructions has no responsibility concerning the goods. Its sole obligation is with the documents" (p. 257).

* * * * * * * *

"I charge you that, in any event, the Russo-Chinese Bank in this matter was only bound

> to use reasonable and ordinary care and skill. It was not bound to use any extraordinary efforts in connection with the said documents and shipment. Thus, for example, there was no duty imposed upon the Russo-Chinese Bank to investigate as to who were the agents of the steamship line at Port Arthur, or as to whether or not Clarkson & Company were the agents of the steamship line, and there was, therefore, no negligence on the part of the Russo-Chinese Bank in failing to notify the National Bank of Commerce of Seattle that Clarkson & Company were the agents of the steamship line at Port Arthur" (p. 258).

The Circuit Court of Appeals did not pass upon the legality of any of these instructions and rulings, especially stating "that they were immaterial in view of the special verdict" (206 Fed. 653).

It is our contention that it is not the duty of a collecting bank under the law merchant to take possession of merchandise for which bills of lading have been sent to it, but that in the absence of special instructions its responsibilities are concerned primarily with the safekeeping of the documents, their presentation for acceptance and payment and notification to the principal. That the relationship between the parties is that of principal and agent and not of seller and buyer. That a collecting bank is not, in the absence of special instructions, "obligated to account for the amount of the draft or the security." That to the contrary it is only responsible if it has been negligent and to the extent only that results from such negli-

gence. That especially can no such responsibility attach in this case since the collecting bank had asked for instructions on this subject but received no answer.

If these rulings were erroneous the errors were not cured by the special verdict because they dealt with the most important and fundamental fact in the case. Since the court in the other instruction complained of said that a neglect of duty concerning the flour was in law a payment of the draft, the jury may have considered that their special verdict was necessitated by the failure to account for the disappearance of the flour and that unless the bank did as a part of its case in chief, show what had become of the flour such failure was in law a payment of the debt.

Third. Your petitioner respectfully represents that the questions embraced within the scope of the foregoing instructions are of great importance to the commercial world, and particularly those engaged in banking; that it has been the custom and understanding of collecting banks that they have no such degree of responsibility as is imposed by this instruction over the goods; that if as stated in this instruction a collecting bank that has received a draft with the bill of lading attached to be delivered upon payment becomes itself personally liable for the payment of this draft, should the property represented by the bill of lading disappear without its knowledge, then that such collecting bank be-

comes in fact a guarantor of such draft and an insurer of the cargo, since it must either produce the cargo or the money; that such measure of responsibility on the part of a collecting bank is so onerous and opposed to the usual custom and practice heretofore prevailing in such cases that if these instructions correctly state the law, it will be necessary that all banks receiving such drafts for collection, and particularly those in the Orient, shall take such measures as lie in their power to prevent any such degree of responsibility attaching to them; that such preventive measures must of necessity seriously interfere with the freedom of commercial transactions of this character and must induce many banks to decline to receive any drafts for collection when accompanied by bills of lading.

In order that these questions may be authoritatively and finally settled by this Honorable Court we petition for this writ.

Wherefore, your petitioner respectfully prays and petitions that a writ of *certiorari* may be issued out of and under the seal of this court directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding said court to certify and send to this court on a certain day to be therein designated a full and complete transcript of the record and all proceedings of the said Court of Appeals in the case therein entitled, "Russo-Chinese Bank, plaintiff in error, v. The National Bank of Com-

merce of Seattle, Washington, defendant in error", No. 2182, and to withhold any further action or order in said case until the further order of this court, to the end that the case may be reviewed and determined by this court as provided by section 6 of the Act of Congress entitled, "An Act to establish Circuit Courts of Appeals, and to define and regulate, in certain cases, the jurisdiction of the courts of the United States, and for other purposes", approved March 3, 1891, and that your petitioner may have such other and further relief or remedy in the premises as to this court may seem appropriate and in conformity with said Act, and that the judgment of said Circuit Court of Appeals in this case, and every part thereof, may be reversed by this Honorable Court.

And your petitioner will ever pray.

RUSSO-CHINESE BANK,
By WARREN GREGORY,
Its Attorney.

W. H. CHICKERING,
WARREN GREGORY,
GEO. H. WHIPPLE,
Attorneys for Petitioner.

State of California,
City and County of San Francisco.—ss.

WARREN GREGORY, being first duly sworn, deposes and says: That he is one of the attorneys for the Russo-Chinese Bank, the petitioner above-named, and as such has had personal charge of the case in the foregoing petition mentioned in the United States Circuit Court for the Western District of Washington, Northern Division, and also in the United States Circuit Court of Appeals for the Ninth Circuit; that he has read the foregoing petition by him subscribed, and that the facts therein stated are true to the best of his information and belief.

WARREN GREGORY.

Subscribed and sworn to before me this 30th day of June, 1914.

(Seal) CHARLES EDELMAN,
Notary Public in and for the City and County of San Francisco, State of California.

No. [redacted] 244

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1914.

SEP 9 1914
JAMES D. MAHER
CLERK

RUSSO-CHINESE BANK,
Petitioner,

vs.

THE NATIONAL BANK OF COMMERCE OF SEATTLE, WASHINGTON,
Respondent.

BRIEF FOR PETITIONER ON PETITION FOR WRIT OF CERTIORARI.

W. H. CHICKERING,
WARREN GREGORY,
GEORGE H. WHIPPLE,
Attorneys for Petitioner.

Filed this.....day of September, 1914.

JAMES D. MAHER, Clerk.

By.....Deputy Clerk.

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Respondent.

BRIEF FOR PETITIONER ON PETITION FOR WRIT OF CERTIORARI.

This petition involves consideration of certain instructions given by the trial court which define the obligations of a bank that has received a draft for collection with bills of lading attached under instructions to deliver the documents upon payment of the draft and also the effect of such collecting bank permitting the consignee to take the

goods under a letter of guaranty that the security will be accounted for.

The facts are given in the petition which accompanies this brief.

Argument.

I.

THE INSTRUCTION TO THE EFFECT THAT PERMISSION GIVEN THE CONSIGNEE TO TAKE OVER THE FLOUR CONSTITUTED IN LAW A PAYMENT OF THE DRAFT IS ERRONEOUS. (Petition, page 14.)

This instruction is found on page 228 of the record and also on page 14 of the petition for the writ of *certiorari*.

1. The arrangement said in this instruction to have been equivalent to a payment of the draft was said by the witness Short (the only witness for either side upon this subject) to have been made at the same time that he accepted the draft (p. 141). If the court's instruction be correct, this acceptance was an idle act because the obligation under the acceptance was created and extinguished at the same moment and a new obligation substituted in its place. Thus the trial court proceeded upon the assumption that there was a novation. Under such assumption there must have been proof that the claim against Clarkson & Co. on their accepted draft was extinguished by the new obligation.

The pleadings, the testimony and the conduct of the parties conclusively demonstrate the contrary.

The definition of a novation is said in the American & English Encyclopedia of Law, vol. 21, p. 661, to be correctly stated in the *California Civil Code,* section 1531, which is as follows:

> "§ 1531. Novation is made:
>
> "1. By the substitution of a new obligation between the same parties, with intent to extinguish the old obligation;
>
> "2. By the substitution of a new debtor in place of the old one, with intent to release the latter; or,
>
> "3. By the substitution of a new creditor in place of the old one, with intent to transfer the rights of the latter to the former."

There was here no new or third party to the guaranty. The parties remained the same as those named in the draft. The first subdivision above designated, to wit, the substitution of a new obligation is the only possible ground therefore to urge that a novation was here effected. In such case it is plain that the original agreement of which novation is sought must be absolutely extinguished and the new agreement substituted for it.

Wharton v. Walker, 4 B. & C. 164.

The pleadings in this case do not count upon any novation, and if it is claimed that a contract has been extinguished by a novation, such fact must be pleaded. The only affirmative defenses set forth in the amended answer are (pp. 12-14), (1) that

the draft was paid in full by Clarkson & Co.; (2) that the Russo-Chinese Bank did not present the draft for acceptance within a reasonable time and that it became the duty of the collecting bank to look after the flour and to warehouse and insure the same; (3) that if the proceeds from the sale of the flour were not used toward the payment of the draft, the failure to have the same so applied was due to the carelessness and negligence of the collecting bank, in that the draft was not protested at the date of its maturity and that the draft and documents accompanying the same were not returned to the Seattle bank, but that on the contrary indefinitely held "to the great injury and damage of this defendant". These allegations in the answer do not proceed upon any assumption that the obligation of the acceptor of the draft was extinguished by the creation of a new obligation, but to the contrary expressly affirm a continuing liability on the draft until it was paid.

Nor was the case tried upon any such theory. If this instruction of the court is correct, it was not necessary that defendant produce any testimony other than to show that this arrangement concerning the letter of guaranty was made. Immediately thereupon under this instruction all obligation on the draft ceased, and this notwithstanding the fact that it was at the same moment accepted, retained by the collecting bank, and subsequently protested for non-payment. This instruction compels the absurd conclusion that the draft

was paid the moment that it was accepted. If it had been the intention of the parties to substitute a new obligation for the old one, the draft would not have been accepted but would have been returned cancelled to Clarkson & Co. The "arrangement" referred to in the instruction was that as the flour was sold from time to time, the proceeds would be turned into the bank by Clarkson & Co. *to be applied on the draft.* This, of course, carries with it the assumption that the obligation under the draft was still an existing and the primary obligation. If the proceeds resulting from the sale of all the flour were paid into the bank, and a deficiency resulted, Clarkson & Co. would still be liable for this deficiency on the draft, not on the guaranty, because the guaranty under such circumstances would have been fully carried out. Then the subsequent conduct of the parties, as shown by the presentation of the draft for payment and protest thereof and remailing to Seattle, are equally inconsistent with any theory that the draft was deemed paid and a new obligation on the guaranty substituted. A novation, therefore, was neither claimed nor proven, and since this instruction in direct effect states the contrary, the assignment of error based thereon necessitates a reversal.

2. If we assume that the Port Arthur branch did, contrary to its instructions, permit Clarkson to take over the flour, then to the extent of the value of the security that was thereby released

it may have been responsible. There might have been a conversion so far as the released flour was concerned, but this conversion could not extend further than the amount and value of the flour so released.

If a pledgee releases collateral from the pledge, it may operate as a payment of the claim *to the extent of the value of the collateral, but no further.*

Randolph on Commercial Paper, 2nd Ed., Section 795;

Hunt v. Nevers, 32 Mass. 504;

Alden v. Camden Anchor-Rockland Mach. Co., (Maine) 78 Atl. 977.

It is useless to speculate whether Clarkson & Co. were able to pay this draft independent of the security since under the theory of the trial court the draft was paid immediately upon permission being given to take possession of the flour. But if this conclusion of the trial court be not followed, then although the bank did without warrant release the security, still no damage resulted to the Seattle bank if Clarkson & Co. were in fact able to pay their draft. There is abundant evidence in the record that Clarkson's financial standing in Port Arthur at this time was good. Short himself testified (p. 149) that Clarkson always had sufficient money on his books and cargo in the go-downs to cover any liabilities that he might have.

There is no showing that the Seattle bank ever attempted to enforce payment of this draft from

Clarkson & Co., or even made any demand therefor. It could not, therefore, be *presumed* that by the release of the security the draft was made valueless. Clarkson & Co. having accepted the draft became its principal debtor, and definitely agreed to pay it ninety days from that date. Thereafter the bank held the documents as security only for the debt and was the pledgee thereof. If it released this pledge in whole or in part, the debt could not be paid to a greater extent that *the value of the property so released.* But under this instruction the jury were told that they must consider that the draft was in law paid regardless of the value of the cargo of flour. The instruction can mean only that if security be released, *whatever its value,* then the principal obligation is *ipso facto* discharged regardless of its amount.

The court could not say as a matter of *law* that the flour even if all of it was proved to have been irretrievably lost, was worth more or less than the face amount of the draft, since this was a *question that the jury were entitled to pass upon,* and the evidence on the subject is not free from contradiction. Thus the respondent's witness Davidson testified (p. 201):

> "There was no market price for flour at that time. The Russians were too busy saving their skins to think of establishing a definite price for edibles as is usual in cases of besieged ports."

and, also (p. 191):

> "* * * I want to state right here that I saw with my own eyes that afternoon a very considerable quantity of flour being stolen which it was impossible for me to prevent. The whole town was in a chaotic state and the people were, more particularly the Chinese, looting everything in sight."

Under the most favorable light for the respondent, and assuming the truth of all of Short's testimony, it can show nothing more for the respondent than that a collecting bank without authority has permitted the consignee to take over the security. On this showing the trial court has charged the jury that they must consider the draft as having been at once paid without any consideration on the part of the jury as to the value of the security lost, or whether it was, indeed, in fact lost at all. This instruction, therefore, would not have been correct even if without contradiction defendant had shown that the Port Arthur bank had without right delivered to Clarkson & Co. these bills of lading and followed this up by evidence that the flour had been sold to other parties and disappeared. Even in such extreme case, it would have been necessary that the court qualify its instruction as to payment by the proviso, "If you consider the value of the property so lost equivalent to the amount due upon the draft", or words to that effect.

But the claimed error in this instruction now stands out in sharper relief than it would if the

facts assumed in the preceding paragraph had been shown. For there is here no proof whatever that the flour was in fact taken over by Clarkson and sold by him. The evidence stops with proof of the agreement that the flour *might* be sold from time to time under a letter of guaranty that its proceeds would be accounted for.

It seems obvious that the respondent, in order to uphold this instruction, must take one of the two horns of a dilemma. It must either claim that the obligation on the draft was completely extinguished when the letter of guaranty was given (in other words, a novation) or that it is the law that whenever a collecting bank releases security under such circumstances, it becomes *ipso facto* and at once liable for the full face amount of the draft, regardless of the value of the security so released.

That the trial court itself had in mind that such release of the security could only pay the debt *pro tanto* is shown by another instruction given to the jury, which is as follows:

> "It is a general rule of law that where collateral security is received for a debt with power to convert the security into money, this is specifically applicable to the payment of such debt; the same person being the party to pay and receive, no act is necessary and the law makes the application. If the proceeds equal or exceed the amount of the debt it is de facto paid; no action would lie for it, and proof of these facts would support the defense of payment. And if you find from the evidence in this case that the plaintiff did consent to

> Clarkson taking over the flour in question and consented to the sale of the same by Clarkson & Company, and then Clarkson & Company sold the flour in question and paid over the proceeds thereof to the plaintiff, then such payment of the proceeds of the sale of such flour to the plaintiff operated as a payment of the draft in question,—provided the proceeds of the sale of the flour equaled the amount of the draft; and if such proceeds did not equal or exceed the amount of the debt then it was a payment pro tanto—that is a payment of so much of the said draft as the proceeds of the sale of the flour would pay of the same; and this is the law, notwithstanding the fact that plaintiff may have received the proceeds of the sale of said flour and placed the same to the credit of Clarkson & Company in its bank, and permitted Clarkson & Company to use said funds for other purposes." (p. 228.)

In the instruction to which objection is now made, the jury were told that if the collecting bank permitted Clarkson & Co. to take over the flour under this arrangement, and with the agreement that Clarkson & Co. would account for the proceeds of its sale, then that such action constituted in law a payment of the draft. The other instruction, to which we make no objection, stated that if Clarkson & Co. sold the flour in question *and paid over the proceeds thereof to the bank,* then that such payment operated as a payment of the draft *pro tanto.*

The objectionable instruction is not cured by the other instruction, but on the contrary is its error thereby emphasized. The one dealt with the effect

of the mere execution of the agreement; the other with the results that followed if Clarkson did in fact sell the flour and pay into the bank the proceeds resulting from such sale.

The first instruction was not coupled with the second, but as an independent proposition of law stated that if the jury found that this arrangement was made they should find a verdict for the defendant. That the mere making of the agreement discharged Clarkson & Co. from its obligation as acceptor of the draft. If this arrangement was made, the jury were told in effect, it was quite immaterial whether or not any of the flour was ever sold or any money realized by the bank. There was no qualification attached. But the second instruction dealt with a different phase of the case. It was concerned primarily with a situation in which it was shown that Clarkson & Co. had actually paid to the bank some of the proceeds resulting from the sale of the flour. The application of funds so received by the bank was the particular subject matter of this second instruction. It was said, and correctly, that the bank having once received from Clarkson any money resulting from the sale of this flour could not excuse itself by permitting Clarkson to use this fund for other purposes.

If such be not the reason for giving these two instructions then they are irreconcilable, because otherwise there was no necessity of giving the second instruction since it was already included

in the first. In the event that they are irreconcilable, and either one be erroneous the petitioner was thereby prejudiced.

The instruction here complained of is inseparably connected with the special verdict, and if erroneous the special verdict did not cure such error. This court has said:

> "* * * it is impossible to say that the defendant's case was not injuriously affected by the admission of the evidence, and, while an appellate court will not disturb a judgment for an immaterial error, yet it should appear beyond a doubt that the error complained of did not and could not have prejudiced the rights of the party duly objecting."
>
> *Boston & Albany R. R. Co. v. O'Reilly,* 158 U. S. 334.

And it was said by the Circuit Court of Appeals for the Eighth Circuit, in *Atchison, T. & S. F. R. Co. v. McClurg,* 59 Fed. 860:

> "* * * unless it clearly appears from the face of the record that the error was harmless, we are not allowed to speculate as to its probable consequences."

In *Deery v. Cray,* 5 Wall. 795, this court said:

> "* * * We concede that it is a sound principle that no judgment should be reversed in a court of error when the error complained of works no injury to the party against whom the ruling was made. But whenever the application of this rule is sought, it must appear so clear as to be beyond doubt that the error did not and could not have prejudiced the party's rights. In the case before us this is not so clear."

Not only does it not appear beyond a doubt that this instruction did not prejudice, but the contrary is manifest.

The learned Court of Appeals did not pass upon the validity of this instruction, expressly stating that any error therein was without prejudice on account of the special verdict of the jury, that the draft had in fact been paid. This was the extent of the opinion. We here respectfully urge that the validity of the instruction must be now considered notwithstanding the special verdict *because it was the authority for that verdict.* In this instruction the trial court stated to the jury the law as to what constituted a payment of the draft. The jury were told that they must consider that the "arrangement" in question if made was equivalent to and resulted in a payment, and that upon proof of such arrangement the verdict *must* be for the defendant. It was equivalent to a direction for a verdict in favor of the defendant. Without doubt the jury found that this draft had been paid because they believed the testimony of Short concerning the arrangement, and this alone compelled the verdict. So if the instruction be erroneous, the verdict must necessarily fail.

So far then as this particular instruction is concerned, it is not necessary to invoke the rule as stated in the preceding citations, that prejudice will be presumed from error. This erroneous instruction was in effect the same thing as the special verdict. One is the cause and the other the effect.

And to say that this effect cures the error in the cause is to at once lay down the principle that no error in any instruction can ever prejudice because it is cured by the verdict based thereon.

II.

THE INSTRUCTION TO THE EFFECT THAT THE LEGAL TITLE TO THE DOCUMENTS AND TO THE FLOUR BECAME VESTED IN THE RUSSO-CHINESE BANK AND THAT THIS BANK COULD NOT BE EXCUSED FROM ITS OBLIGATIONS TO ACCOUNT BY SAYING THAT THE FLOUR DISAPPEARED WITHOUT ITS KNOWLEDGE IS ERRONEOUS.

These instructions are found on pages 16-19 of the petition.

It is submitted that the court here placed before the jury an erroneous statement of the law as to the relations existing between the two banks; that the Port Arthur branch was not the owner either of the documents or the flour for two reasons: (a) That the relationship between these banks was that of principal and agent, and not of vendor and vendee; and, (b) Because the documents were accompanied by an invoice or a bill of sale from Centennial Mill Company to Clarkson & Co., showing that the Port Arthur branch was acting as a collection agent only and that it could not sell the flour to anyone other than Clarkson.

As to the general duties of a collecting bank under like circumstances it is said in *Grant on Banking* (Sixth Edition), page 53:

"The duty of the collecting banker as to bills and cheques paid in for collection is to present them for acceptance when necessary, and for payment to the proper person. The collecting banker must also give notice of dishonor with regard to any bills and cheques dishonored on presentation by him."

Morse on Banking (4th Ed.), Sec. 217, says:

"Indorsement for collection does not give the bank title to the paper, nor render the depositor liable as an endorser, nor guarantee the drawer's signature. But the bank is deemed the holder, to receive and transmit notice of non-payment."

Sec. 218. "A bank contracts to use due diligence in the business of collection, and it is 'bound only to reasonable care and diligence in the discharge of its assumed duties. In a case of doubt its best judgment is all the principal has a right to require'. *Especially if the doubt arises by reason of the neglect of the principal to give specific instructions,* the bank will be acquitted even if its discretion be exercised erroneously."

Sec. 219. "The bank's duty is to act for its principal's best interest and to preserve the liability of all parties to him."

In *Second National Bank of Baltimore v. Bank of Alma,* (Ark.) 138 S. W. Rep. 472, a draft with bill of lading attached had been sent the bank with instructions to deliver it upon payment. The court said:

"By accepting for collection the draft accompanied by the bill of lading, the plaintiff only became the agent of the Judge Machine Company for that purpose, *and it did not thereby*

become the true owner of the draft or of the machine which was covered by the bill of lading accompanying the draft."

Nebraska &c. v. First National Bank of Falls City, (Neb.) 110 N. W. Rep. 1019.

In this case the court was called upon to pass upon the question as to the nature of the title to a draft and bill of lading sent a collecting bank. It was said:

"We adopt, without qualification, the contention of counsel for appellant that the principles of the law merchant are without applicability to the case made by the petition, and that the latter is to be decided in accordance with the rules of law governing the relation of principal and agent, and, having adopted it, there appears to us no doubtful problem for solution. The functions and obligations of a collecting agent, merely as such, do not differ essentially or characteristically from those of a messenger boy. What may be his moral or social standing or financial responsibility are, so long as he is free from knowledge or participation in any wrong-doing by his principal, matters of no importance. *He performs his whole duty by delivering what he is charged with delivering and receiving what he is intrusted to receive, in exchange, and by disposing of the latter as his principal has directed. It is not only not his duty, but it would be an impertinence by him, to inquire into the value, genuineness, or validity of either the one article or the other"* (p. 1020).

In *Hambro v. Casey,* 110 U. S. 216, this court said that a collecting bank holding a draft sent it for collection was the holder of the bills,

"but in no legal sense the owners, though it may be their lien is for more than can be collected from the drawers or drawees."

In *Balbach v. Frelinghuysen*, 15 Fed. Rep. 675, it was held that a check deposited in a bank by its customer for collection does not become the property of the bank, but the bank continues to be the agent of the customer until the collection of the check, which remains in the meantime the property of the depositor. The following quotation from *Morse on Banking* is approved:

"Where the customer deposits in the bank commercial paper for collection, at the same time indorsing it over to the bank, the parties understanding that it is only intended by the indorsement to put the paper in such shape that the bank can collect upon it, the title in the paper does not thereby pass to the bank, nor does the bank owe the amount to the customer until such time as the collection is actually consummated. Neither is this strict right of the bank curtailed or altered simply because a practice has been allowed to prevail by which it has allowed the depositor to draw against deposits of paper for collection before the collection has been actually made. This is a mere gratuitous privilege, allowed by the bank, which does not grow into a binding legal usage. Thus, it is very common for depositors to deposit checks with their banks, and to draw against them on the same day checks of their own, which may be presented for payment before the bank has had an opportunity to collect upon the deposited checks. In such cases banks are frequently wont to honor such checks of their customers upon the confidence that the deposited checks will be duly paid. But this habit of the

banks is a pure favor, and if there be no distinct understanding to change the natural effect of such dealing, its long continuance gives no real right whatsoever to the depositor to demand its continuance or its practice in any individual case wherein the bank may, for an arbitrary reason, see fit to withhold that favor. Scott v. Ocean Bank, 23 N. Y. 289. In England, a decision given by Lord Ellenborough (9 East. 21) went much further even than this. Bills, not yet due, were sent to a country banker to collect. According to the custom of country bankers these were actually entered in the banker's own books to the depositor's credit, with the proper discount, and he was thereafter entitled to draw against this credit before the actual collection. Upon the subsequent failure of the banker, before the collection, it was held that the title in the bills had not passed to him, and that the depositor should recover them specifically, or their amount, if the bankrupt's assignee had already made the collection" (pp. 683-684).

In other words, this case holds that even if the Port Arthur branch had upon receipt of these documents placed the amount of the draft to the credit of the Seattle bank, that nevertheless the title in the documents would not have passed to the Port Arthur branch and in the event of its bankruptcy they could have been recovered specifically by the Seattle bank.

In *Wisconsin &c. Bank v. Bank of British North America*, 21 Upper Canada Queen's Bench Reports 284, a firm called Thomas Clarkson & Co. in Milwaukee drew a draft upon Clarkson, Hunter & Co. in Toronto and gave it to the plaintiff bank, to-

gether with a bill of lading, for ten thousand bushels of wheat; and these documents being endorsed by the plaintiff bank were sent to the defendant bank in Toronto to hold them as security for the due payment of the bill of exchange. The bill of exchange was presented and accepted in due course, but not paid. The bill of lading was delivered by the Toronto bank to Clarkson, Hunter & Co. upon acceptance of the draft. The question involved was as to the right of the collecting bank to deliver the bill of lading when the draft was accepted, and prior to payment. It was held, in the absence of specific instructions, that the collecting bank was justified in so doing, establishing the rule subsequently followed by the supreme court of the United States in *National Bank v. Merchants Bank,* 91 U. S. 92. A question was involved as to the duty of the bank to ascertain the identity between the Milwaukee and Toronto firms of Clarkson, Hunter & Co. The court held that there was no such obligation on the part of the collecting bank. It was said:

> "Here the wheat got into the possession of the consignees with the privity of the plaintiffs, and not because of the delivery to them of the bill of landing by the defendants, which is complained of. By accepting the bill drawn upon them they entitled themselves to the bill of lading which accompanied it, and which, without special instructions to the contrary, the defendants were left to assume had been sent to them *for no other purpose than to enable the consignees to see that they were to be vested with full control over the property if they accepted the bill.*

> "If anything else had been intended the plaintiffs would hardly have selected a bank as their agent, for they could not expect of them that they would undertake that kind of agency which would require them either to take the 10,000 bushels of wheat into their possession, and retain it during the forty-five days, or that they should keep a constant watch upon the conduct and circumstances of the assignees, in order that they might step in with the bill of lading (if they retained it), and exercise the rights of the consignors as soon as they suspected insolvency" (p. 293).

It may here be said parenthetically that if any such burden as was imposed upon the Port Arthur branch by the court's instructions was intended by the Seattle bank, it would hardly have selected a bank as its agent, because it would have compelled the Port Arthur branch to advance the freight on the cargo, amounting to several thousands of dollars, store and insure it at its expense, and then stand guard over it as long as it remained in Port Arthur and was not paid for.

In *Dickerson v. Wason*, 47 N. Y. 439, it was said, quoting from the syllabus:

> "The property in business paper received for collection by one engaged in the business of banking and collection, and forwarded by him to his correspondent in the usual course of such business, without any express agreement in reference thereto, does not become vested in the correspondent, although he may have remitted upon general account, in anticipation of collections."

It was further held in this case that if the property in the note is to vest in the correspondent for collection he or it *must become absolutely responsible* to the principal for the amount, and that the obligation to become thus responsible can be established only by a contract to be expressly proven or inferred from an unequivocal course of dealing.

In the present case if the Port Arthur branch became the owner of these documents, as the jury were instructed it must have been by virtue of some special contract, and none such has been shown; if the Port Arthur branch became the owner of these documents and the goods represented by the bills of lading, then there must have been an obligation on the part of the Port Arthur branch to pay the Seattle bank the purchase price of the flour. In other words, this transaction must be shifted from one of agency to one of purchase and sale. The instructions of the trial court imposed upon the Port Arthur branch the same obligations concerning the care of this flour as if the Port Arthur branch had agreed to buy it from the Seattle bank.

Generally, that a collecting bank does not acquire title to documents or the property represented thereby which are sent to it for collection,

Tyson v. Western National Bank, (Maryland) 26 Atl. Rep. 520;

Midland National Bank v. Brightwell, (Missouri) 49 S. W. Rep. 994;

Commercial National Bank v. Armstrong, 39 Fed. 684.

A collecting bank cannot sell the goods represented by a bill of lading to a third party without notice to the sender.

Gregg v. Bank of Columbia, (South Carolina) 52 S. E. Rep. 195, in which the court said:

> "The Chicago owner of the corn had through drafts and bills of lading invested the Bank of Columbia with legal authority to offer the corn to Miot, whether as purchaser or as agent of the plaintiff is not material; but when he refused to take it, the authority of the bank was at an end, and it had no more right to sell the corn to another than if it had never had the drafts."

In discharge of its duties as agent the Port Arthur branch was bound only to exercise reasonable care and diligence.

National Bank v. Merchants Bank, 91 U. S. 92, in which this court said:

> "In the case in hand, the Bank of Commerce, having accepted the agency to collect, was bound only to reasonable care and diligence in the discharge of its assumed duties. Warren v. Suffolk Bank, 10 Cushing 582. In a case of doubt, its best judgment was all the principal had a right to require. If the absence of specific instructions left it uncertain what was to be done, further than to procure acceptances of the drafts and to receive payment when they fell due, it was the fault of the principal. If the consequence was a loss, it would be most unjust to cast the loss on the agent."

Bank of Bay &c. v. Monongahela National Bank, 126 Fed. Rep. 436.

The foregoing authorities, and many others which are therein cited, hold without dissent that the true theory of the relationship between the Seattle and Port Arthur branch was that of principal and agent, and in no sense that of vendor and vendee. Therefore the instruction of the trial court to the effect that (p. 227):

> "* * * the legal title to the draft and the documents and to the flour in question passed to and became vested in the Russo-Chinese Bank, and I instruct you as a matter of law, it was in the power of the plaintiff to handle, control, sell and dispose of such flour in any way that was deemed expedient by the plaintiff,"

is erroneous; for if the title to the draft and bill of lading was not vested in the Port Arthur branch *a fortiori,* the title to the flour could not have been vested in that bank.

This leads to the second suggestion, which was not considered by the trial court in the instructions given and which appears upon its face at least to at once show the erroneous character of the instruction. This is the fact that there accompanied the draft bills of lading, an insurance policy, and an invoice or bill of sale (p. 29) which recited that the Centennial Mill Company had sold to Clarkson & Co. the flour in question at $4.10 per sack. The terms stated were: "Draft 90 days thro Russo-Chinese Bank". When the Port Arthur branch re-

ceived this document, which as noted was sent it as a part of the transaction, and when furthermore the letter from Seattle transmitting the draft read (p. 44):

"Seattle, Wash., Dec. 11, 1903.

The Manager Russo-Chinese Bank, Port Arthur, China.

Dear Sir: Enclosed I hand you *for collection* and returns in New York funds 90 d/s drafts as follows:

Clarkson & Co. G. $ 1,100.00
" " " G. $36,194.80

Documents are to be delivered on payment.

Very truly yours,

R. R. SPENCER."

(Italics ours.)

it is shown that the sole function of the Port Arthur branch was to handle these documents for collection; that they could not sell this flour to anyone other than Clarkson & Co., and that they never had any title, nor was it intended by the Seattle bank that they should have any title to the *flour*. As a part of this express agency for collection, they were, it is true, vested with the ostensible ownership of the flour by virtue of the possession of the bills of lading, but this was as an agent merely, and not as an owner.

The Port Arthur branch had nothing to do with the selection of the common carrier which transmitted the flour to Port Arthur, and its agents assert that they did not know that Clarkson & Co. were the agents of the steamship line until after the flour had been received in Port Arthur, and then, on

account of investigations which they made at the request of Mr. Ostrander. But it is immaterial whether they knew that fact or not. It appears that there was no reason to suppose that Clarkson & Co. were not solvent at the time, and not a reliable house. Clarkson & Co. had for some years been buying flour in large quantities from the Centennial Mill Company and through these banks (p. 135). Mr. Ostrander, the general agent of the Centennial Mill Company testified (p. 135) that he was at Port Arthur late in January and early in February, 1904; that he knew Clarkson & Co. well and knew that they were agents of the steamboat company, and that such was a well-known fact. We ask under what possible theory is it claimed that the Russian bank should in this especial case have been called upon to take all these precautions when it had never done so in the past?

If there could have been any element of suspicion from the fact that Clarkson was also the agent of the steamship company, the Seattle bank cannot complain that they were not notified thereof by the Port Arthur branch, because the Centennial Mill Company at least knew that fact, and did not deem it a circumstance sufficient to comment upon.

The instructions of the trial court placed upon the Port Arthur branch a responsibility which we assert is entirely foreign and beyond that of a bank handling documents for collection. It would render such banking business impossible, because it would thrust upon a collecting bank heavy responsibilities

and oblige it to make outlays as to a cargo which might be worthless. In the present case it is apparently claimed that the Port Arthur branch, without any specific request from the Seattle bank and merely by force of its employment, should have at once taken the following steps:

1. To pay the freight of $5.00 per ton, or $4325.72 (p. 31), because the bill of lading stated that the freight, "with all other charges, advanced " charges and average, should be paid immediately " upon the discharge at Port Arthur".

2. To secure other warehouse accommodations (if there were any in Port Arthur) and pay the cost of moving the flour from the warehouse of Clarkson & Co. to this other warehouse.

3. To pay the cost of insurance.

4. Apparently also to place watch over and guard the flour.

This responsibility, however, becomes still more extraordinary when the conditions under which the documents were transmitted are considered, for, as noted, these banks had had similar transactions for some time. Mr. Spencer testified (p. 122) that the letter his bank received from the Port Arthur branch dated January 22, 19[illegible] knowledging the receipt of the draft was the [illegible]rm in which he had received such acknowledgments. This letter contained the following statement (p. 123):

"PLEASE NOTE.

1. That, unless otherwise instructed, bills of any description sent us for procuring accept-

ances &/or for collection will be protested both for non-acceptance or non-payment and immediately returned to the sender.

2. When sending us for collection DOCUMENTARY BILLS OR ONLY DOCUMENTS, clearly state in your letter accompanying same whether in case of dishonor:—

(a) both bill and documents are to be promptly returned with the relative deed of protest, or

(b) if the bills is to be returned and the relative documents are to be kept here at your disposal, or

(c) if the goods are to be stored by us and fire insurance is to be covered pending receipt of your instructions.

3. Our bank does not guarantee that the goods be stored in due time when there is no storage accommodation obtainable, and takes no responsibility whatever if same are not landed in perfect condition, nor if the goods are deteriorating or becoming of lower value in consequence of price fluctuations while under our bank's control.

Yours faithfully,
RUSSO-CHINESE BANK,
(Port Arthur Branch).
W. S. DAVIDSON."

It is admitted by Mr. Spencer that he did not give any special instructions (p. 124). By the instructions of the court the Port Arthur branch was held under its common law liability to do these acts concerning which it had asked for express instructions and which the Seattle bank did not take the precaution to give. It was furthermore asked to exercise a greater care over the flour than Mr.

Ostrander, the agent of the Centennial Mill Co., thought was necessary. We have therefore the unique result, that the court imposes upon a collecting bank a greater degree of care and a heavier responsibility than either the shipper of the flour or the bank from which the draft was received ever had in contemplation.

There is still a third consideration in no wise referred to in the foregoing instructions, and which tends to prove that the Port Arthur branch was not the unqualified owner of the flour, in accordance with the court's instructions. This arises from the fact that the *draft had been accepted by Clarkson & Company.* This essential step in the transaction has been ignored, and the relations of the parties defined as if the draft had *not* been accepted. When the draft was accepted by Clarkson & Co. they became the principal debtor thereof and the document was to all intents and purposes a promissory note, by which Clarkson agreed absolutely to pay the sum mentioned, ninety days from date. As soon as this acceptance was obtained the Port Arthur branch could not dispose of this flour to anyone other than Clarkson & Co., for the reason that they retained title simply *as security for the payment of the draft.* If there was no obligation on the part of the Port Arthur branch to transfer the bills of lading to Clarkson & Co., then there was no consideration for the payment of the draft; per contra, if there was such consideration for the

draft, then there must have been a corresponding obligation on the part of the Port Arthur branch.

We refer in this connection to the leading case of *National Bank v. Merchants Bank,* 91 U. S. 92. In this case the bills of lading were delivered upon acceptance of the draft, and it was held that the bank was obliged to deliver them upon such acceptance. The case of course differs from the present one in that there was here an express instruction to deliver against payment, but even in such a case this opinion holds that the property is retained by the bank merely *as security.* That the fact that the draft is one "for collection" indicates an agency, and rebuts the inference that the agent is the owner of the draft. Directly pertinent is the following statement by the court (p. 97):

> "In the absence of special agreement, what is the consideration for acceptance of a time draft drawn against merchandise consigned? Is it the merchandise? or is it the promise of the consignor to deliver? If the latter, the consignor may be wholly irresponsible. If the bill of lading be to his order, he may, after acceptance of the draft, indorse it to a stranger, and thus wholly withdraw the goods from any possibility of their ever coming to the hands of the acceptor. Is, then, the acceptance a mere purchase of the promise of the drawer? If so, why are the goods forwarded before the time designated for payment? They are as much, after shipment, under the control of the drawer, as they were before. Why incur the expense of storage and of insurance? And if the draft with the goods or with the bill of lading be sent to a bank for collection, as in

> the case before us, *can it be incumbent upon the bank to take and maintain custody of the property sent during the interval between the acceptance and the time fixed for payment? (The shipments in this case were hundreds of bales of cotton.)* Meanwhile, though it be a twelvemonth, and no matter what the fluctuations in the market value of the goods may be, are the goods to be withheld from sale or use? Is the drawee to run the risk of falling prices, with no abiltiy to sell till the draft is due? If the consignment be of perishable articles,—such as peaches, fish, butter, eggs, &c.,—are they to remain in a warehouse until the term of credit shall expire? And who is to pay the warehouse charges? Certainly not the drawees. If they are to be paid by the vendor, or one who has succeeded to the place of the vendor by indorsement of the draft and bill of lading, he fails to obtain the price for which the goods were sold." (Italics ours.)

We have searched the books to find a case in which it has been held that a collecting bank has in the absence of special instructions any such degree of responsibility concerning goods which are evidenced by a bill of lading that passes through its hands. No such case has been brought to our attention, nor can we find that any such claim has been made. This silence on the subject is strong evidence that it is not founded upon any legal right. As was said in *Le Caux v. Eden*, 2 Doug. 594, cited in *Bancroft v. Bancroft*, 110 Cal. 374, concerning another question:

> "There is no case in which it has ever been holden that such an action would lie; and if it could be maintained, there are, in every way,

> such frequent opportunities for it that it must have happened in every day's practice, or some instances at least must have been in the memory of those who have had long experience in 'Westminster Hall'; but there is not the smallest trace of such a determination, or even dictum, in any court in England. A universal silence in Westminster Hall on a subject which so frequently gives occasion for litigation is a strong argument to prove that no such action can be sustained. That case was decided in 1781, and dealt with litigation which could arise only out of the exceptional condition of war. How much stronger, therefore, is the authority of more than another hundred years of 'silence' in the courts of both England and America, upon a subject which, both in peace and war, 'so frequently gives occasion for litigation'." (pp. 378-379.)

Nor can it be said that this instruction of the trial court, to the effect that the collecting bank became invested with the title and ownership of the flour as to all the world except the National Bank of Commerce, is a theoretical error merely; this for the reason that it is the foundation upon which was built up the specific postulate with which this instruction concluded, viz.:

> "As the agent for the owner it was obligated to account for the amount of the draft, to account for the security which the bill of lading constituted, *and it cannot be excused from obligation to account by saying that the flour disappeared without its knowledge* and require the defendant in this case in order to fasten an obligation upon it to prove that it was negligent."

The refusal to instruct that the collecting bank's duty was with the documents and its measure of responsibility only a "reasonable" one (petition, pp. 18-19) further illustrates the importance of this theory of "ownership".

Thus there was completely withdrawn from the consideration of the jury the question as to whether or not the collecting bank was in fact negligent. This negligence was presumed as a matter of law. If the flour had been destroyed by the Japanese invading forces, or other external cause, and such facts were admitted, still the collecting bank would have been liable because the question of its negligence or absence of negligence was not to be considered at all. It must either pay the draft or produce the flour. In other words, it was the real *purchaser* of the flour, and therefore regardless of any happening obliged to pay the purchase price.

III.

IF THE INSTRUCTIONS CONCERNING THE DUTY OF THE COLLECTING BANK WERE ERRONEOUS, THEN SUCH ERROR IS NOT CURED BY THE SPECIAL VERDICT.

The Circuit Court of Appeals expressly declined to pass upon the validity of these instructions, saying that in view of the special verdict they were immaterial. If erroneous instructions as fundamental as these do not presume error, then it is difficult to understand to what state of facts the

rule that error presumes prejudice can be applied, for these instructions deal with the most important element in the case.

By other instructions the jury were told that to find that the draft had been paid they need not necessarily consider that this payment had been made *in money*. By this very instruction they were told that if the flour was traced into the collecting bank's hands, such bank must account for the amount of the draft and cannot be excused from this obligation by saying that the flour disappeared without its knowledge. This failure to account for the flour could, in view of the instructions as a whole, have been considered by the jury as a payment. It might well have been that the jury returned their special verdict to the effect that the draft had been paid, because they believed that the Port Arthur branch had failed to account for the flour. Under the court's instructions, such a conclusion would have been permissible.

The instructions given and those refused make the issue clear-cut. The theory of the trial court, as disclosed by these rulings, was that a collecting bank which has taken a draft for collection accompanied by documents is under a primary duty not only as concerns the documents, their safekeeping, presentation for acceptance and protest for nonpayment, etc., but also without any instructions to that effect to take possession of and care for the property evidenced by the bills of lading to the same extent as if it were the *actual owner of the goods*.

It is obvious that such a theory given through the medium of instructions must have the most direct influence upon the verdict of a jury in a case such as this one. Since the failure of the collecting bank to comply with its obligations concerning the safe-keeping of the flour is treated as if it were a *payment*, then the special verdict that the draft was in fact paid cannot cure the error of the instruction, if it be erroneous.

IV.

THE FAILURE OF PLAINTIFF TO CALL AS A WITNESS OFSIANKIN AND TO PRODUCE THE WRITTEN AGREEMENT OF GUARANTY.

The ground upon which this petition is sought is error in the instructions of the trial court. It is recognized that this court will not upon this proceeding be primarily concerned with questions of fact. Since the Court of Appeals, however, in its opinion rested its conclusion upon the ground that there was at least some evidence to support the special verdict and therefore that all other questions in the case became immaterial, and particularly regarded "as a most significant circumstance" that the manager of the Port Arthur branch, Ofsiankin, was not called to contradict the testimony of Short and Davidson, and that the written agreement of guaranty was not produced or accounted for, we deem it necessary to briefly refer to this phase of the case.

The claim that the collecting bank had violated its instruction by taking this so-called letter of guaranty was not mentioned in this case until the witness Short was called. It is not referred to in the pleadings. Practically all the testimony in behalf of the petitioner, plaintiff below, was produced through the medium of depositions taken in Russia. In none of these depositions was there any intimation from the defendant below that it claimed any such defense. The witness Friedberg, one of the managers of the Port Arthur branch, had testified (Record, p. 33), denying positively that the Port Arthur branch had ever received possession of the flour or sold it to any one.

Upon the testimony of Short alone is there any support whatever for this arrangement under the letter of guaranty. His testimony in brief is that when he accepted the draft in behalf of Clarkson & Co., Ofsiankin, then manager at the bank, *verbally* told him, Short, that he might take the flour and sell it under the letter of guaranty, and that the letter of guaranty was furnished. It was said that this arrangement was made in a most informal and hurried manner, there being at the time a crowd of people in the bank (164). Short was unable (Record, pp. 154-155) to state the language of the letter of guaranty in general terms. He said (p. 155):

"Q. And what did the bank give you?
"A. What did the bank give us?
"Q. Yes.

"A. Permission to take the cargo.
"Q. Did it give you any writing?
"A. No.
"Q. No writing at all.
"A. No writing.
"Q. Didn't they deliver you the documents sometimes?
"A. Sometimes they did. If we asked for them we would get them.
"Q. Didn't you always ask for the documents?
"A. No.
* * *
(p. 156)
"Q. So that the only thing that was done was that you would sign this letter?
"A. Yes.
"Q. And then you would have a sort of an oral talk with the manager?
"A. Yes."

In another portion of his testimony this witness said (p. 163) that he knew that Clarkson & Co. as importers had no right to deliver the goods without the production of the bills of lading and that he did not ask for the bills of lading in this case.

The failure to call the witness Ofsiankin to refute this testimony was, of course, petitioner's misfortune; but inasmuch as it had in its case in chief shown that it claimed never to have had anything to do with the flour, and as Ofsiankin was in Vladivostok at the time of the trial, we think that no significance should be attached to the failure to call him, or to secure his deposition, because the plaintiff below had no reason to suppose up to the time that Short's testimony was given that he, Ofsiankin,

more than any other employe of the bank would be the one with whom this arrangement would be claimed to have been made. Nor can any inference of concealed information be attributed to the petitioner because it did not produce this letter of guaranty for the obvious reason that it has denied that it ever obtained possession of the shipment of flour and does (Friedberg, p. 33) not admit it ever received any such letter.

The deposition of Davidson did not intimate that any such defense would be claimed. To the contrary, the testimony of this witness is directly opposed to that of Short, for he testified, and this statement is many times repeated, that the bills of lading were always delivered by the bank when the letter of guaranty was given, and that Clarkson was never permitted to sell the flour until after the bills of lading had been delivered (Record, pp. 191 and 209). Since the petitioner had in its possession the bills of lading and produced them at the trial, it had substantial reason to suppose that the custom testified to by Davidson had not been carried out in this case, and that the collecting bank had not given permission to Clarkson & Co. to take this particular cargo.

V.

CONCLUSION.

Your petitioner realizes that in its petition and in this brief the facts of the case are possibly discussed

in greater detail than is usual in like petitions presented to this honorable court. It seemed, however, necessary to adopt this course on account of the opinion of the learned court below which declined to consider any of these instructions or the rulings thereon upon the sole ground that even if erroneous these rulings were not prejudicial since the jury in its special verdict had found that the draft was in fact paid. It has therefore been necessary to connect these rulings with the special verdict for the purpose of demonstrating that such instruction had or might have a direct and controlling influence in enabling the jury to reach its conclusion as to the fact of payment.

The money here sued for was paid the respondent by the petitioner when both parties were ignorant of the facts as they existed at Port Arthur. The respondent received the money under a distinct promise that it would repay if it subsequently developed that the draft had not in fact been paid. At the conclusion of the war, the petitioner submitted to the respondent evidence of non-payment which seems conclusive if one is to reach conclusions as determined by the common experience of men in such affairs. The fact that the draft was not given Clarkson & Co., but was protested for non-payment and re-mailed to Seattle, that the books of the Port Arthur branch show no acknowledgment of the receipt of any money on account of this draft, that the employes of the Port Arthur branch having the matter particularly in charge testified positively

that the draft was not paid in whole or in part;—any one of these circumstances would in ordinary affairs be adjudged quite sufficient, and when they are combined seem irrefutable. As against this showing, respondent has produced no direct proof of payment. There is not a document nor a word of testimony that the collecting bank ever received a dollar on this draft, and we here call attention, in passing, to another claimed error of the trial court, because it declined to give the instruction requested by petitioner that there was no evidence of any payment of the draft (Record, p. 258, subd. 8).

Not only did the trial court refuse this instruction, but permitted proof of inferences and presumptions of payment as shown by transactions that had previously occurred under radically different conditions. But there is no evidence of any facts from which any inference or presumption may be deduced that the respondent bank had in fact received any money for this draft. If it was paid, then the Seattle bank would have had a cause of action against the Port Arthur branch for money had and received. There can be no claim that there was any evidence produced in this case which would have made a sufficient showing to have enabled the Seattle bank to recover in such action on assumpsit. Herein lies the importance and materiality of the instructions given as the only support for this verdict of payment. If, as we respectfully submit,

they are fundamentally erroneous, then they are necessarily prejudicial.

The facts in this case are singularly free from dispute. They show that without any special instructions, and for a nominal consideration, a collecting bank undertook to handle certain documents. No mention was made of any duty concerning the goods evidenced by the bills of lading. The only instruction concerned the documents. The petitioning bank in the highest good faith, and relying upon the assertion of the respondent bank that the Port Arthur branch had in fact received the money for this draft, paid it upon the single condition that if the documents were returned showing that the draft had not been paid, then that the money would be repaid. The collecting bank subsequently was able to show that it had cared for these documents with the most scrupulous fidelity. Notwithstanding the extreme conditions prevailing at Port Arthur incident to the war, the bank was kept open by its officials and its business attended to as far as possible. Although it was claimed in the answer that the collecting bank had been negligent in failing to present the draft for acceptance within time and to protest it for non-payment, no evidence was produced to substantiate those allegations, and the trial court instructed the jury that there was no evidence to sustain them (Record, p. 225). Here it would seem that at least the *prima facie* obligation of the petitioner ceased. It had performed what it was requested to do. But by reason of the instructions

of the trial court, a new and much more onerous obligation has been injected into the obligation of any bank that receives a draft for collection. It must not only look after and preserve the documents, but it has the same obligations as concerns the goods. Thus this case is one of extreme importance to all banks engaged in the business of handling drafts and documents for collection. If they are obliged in every case to look after the goods, pay the freight, insure them, etc., it is manifest that such obligation should be at once made known.

Through the result of this litigation as thus far concluded, there has been forced upon the collecting bank the obligation of actually paying for this large consignment of flour, notwithstanding that it had no personal interest therein and has never been paid even its collecting charges. The flour was sent to the Orient at a time when the consignor and the Seattle bank fully realized that war between Russia and Japan was imminent, and that Port Arthur would probably be the scene of the opening hostilities of that war. Yet by the anomalous results of this case the sole risk of such enterprise has been imposed upon a third party and the profit realized by those who voluntarily embarked upon the enterprise.

It is respectfully requested that this writ of certiorari be granted, to the end that by a final and authoritative decision of this court all banks acting as such collecting agents may be informed of their obligations and duties so that they may take such

precautions as may be necessary to guard against any such unique responsibility as has been visited upon the collecting bank in this case.

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JAMES D. MAHER
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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1915

No. 244

RUSSO-CHINESE BANK,
Petitioner,

vs.

THE NATIONAL BANK OF COMMERCE OF SEATTLE, WASHINGTON,
Respondent.

BRIEF FOR PETITIONER.

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JAMES D. MAHER, Clerk.

By_____Deputy Clerk.

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In the Supreme Court
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OCTOBER TERM, 1915

No. 244

RUSSO-CHINESE BANK,
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vs.

THE NATIONAL BANK OF COMMERCE OF SEATTLE, WASHINGTON,
Respondent.

BRIEF FOR PETITIONER.

This is on writ of *certiorari* to the United States Circuit Court of Appeals for the Ninth Circuit.

I.

Statement of the Case and the Questions Involved.

First. The record. The first trial of this action resulted in a judgment of nonsuit entered March 17, 1910, upon the theory that the complaint counted only upon an express promise of respondent to repay the money, and that such express promise

was conditioned upon the return to respondent at Seattle of the bills of lading and the draft.

Upon the pleadings and a bill of exceptions, duly settled, the case was taken by writ of error to the Circuit Court of Appeals for the Ninth Circuit which, on April 3, 1911, reversed the judgment and remanded the case for a new trial. The opinion of the court (187 Fed. Rep. 80) contains a full and correct statement of the facts as shown at the first trial, and decided as the law of the case that the allegations of the complaint stated a cause of action upon an implied agreement to restore money paid under a mistake of fact as well as upon an express agreement to repay the money, and that the evidence submitted for the petitioner was sufficient to go to the jury.

A new trial was had before the court, Honorable C. H. Hanford presiding, sitting with a jury, which rendered a general verdict in favor of the respondent and also a special verdict to the effect that the respondent did receive payment for the draft dated December 11, 1903, and judgment thereon was entered on June 18, 1912.

Upon the pleadings and bill of exceptions, duly settled, the case was again taken by writ of error to the Circuit Court of Appeals which on July 7, 1913, affirmed the judgment (206 Fed. Rep. 646) upon the sole ground that the special verdict made any other alleged error in the record immaterial. A rehearing was ordered by the Circuit Court of

Appeals from this last judgment and on the 4th day of May, 1914, a second opinion was filed simply stating that the judgment was affirmed for the reasons stated in the opinion rendered on July 7, 1913.

Second. The facts. The following is a condensed statement of the facts:

The petitioner is a banking corporation created under the laws of the Empire of Russia and having a head office at St. Petersburg with numerous branches throughout the principal cities of the world, including Port Arthur.

The respondent is a banking corporation having its business at Seattle, Washington.

The Centennial Mill Company of Seattle had for some time prior to the incidents out of which this litigation arose been accustomed to send large consignments of flour to Clarkson & Co., an importing firm having its principal place of business at Vladivostok and a branch office at Port Arthur. The customary method of transacting this business was that the Centennial Mill Company would draw a draft on Clarkson & Co. for the purchase price of the flour which with the bills of lading were delivered to the respondent bank in Seattle which then discounted the draft and paid the mill company.

Then the Seattle bank would send the draft with the bills of lading and insurance policy to the Port Arthur branch of the petitioner for collection, documents to be delivered on payment. These drafts would be acknowledged by the Port Arthur branch

in a recognized form of letter (Trans. p. 90) in which it was stated that specific instructions must be given concerning the disposition of the bills and documents and storage of the goods if the draft be dishonored. The Seattle bank never gave the Port Arthur branch any special instructions on this subject (p. 91).

The particular facts of this case arose out of a draft in the face amount of $36,194.80, dated December 10, 1903, and payable ninety days after sight, to pay for the shipment of 35,312 quarter-sacks of flour sent by the ship "Hyades" belonging to the Boston Steamship Company and the Boston Towboat Company. Clarkson & Co. were the agents of these steamship lines in Port Arthur. The respondent bank sent to the Port Arthur branch this draft reading as follows:

"Exch. for
G $36,194.80.

"Seattle, Washington, December 11th, 1903.

"Ninety (90) days after sight of this First of Exchange (Second unpaid) pay to the order of the National Bank of Commerce thirty-six thousand one hundred ninety-four & 80/100 dollars with exchange and collection charges, value received, and charge the same to account of

"CENTENNIAL MILL COMPANY,
"By M. Thomsen, President.

"Gold
"1 To Clarkson & Company,
"Port Arthur, China.
"No. 1559.

"Payable at the Bank's demand rate of exchange on New York at due date, together with

interest at six per cent per annum from date of this bill to estimated date of return of remittance in Seattle, Washington.

"Pay Banque Russo Chinoise or order.

"THE NATIONAL BANK OF COMMERCE,
"Seattle, Washington.
"By R. R. Spencer, Cashier."

This draft with the policy of insurance loss payable to Centennial Mill Co. or order (p. 21) and bill of lading which was deliverable to shippers' order (p. 22) and an invoice or bill or sale (p. 21) from the Centennial Mill Company to Clarkson & Co. were then sent by the Seattle bank to the Port Arthur branch which received them on January 22, 1904, according to the Gregorian or new style calendar, or January 9, 1904, according to the Julian or old style calendar. (The dates in accordance with the new style calendar are given hereafter.) On the same day the Port Arthur branch acknowledged receipt to the respondent bank in a letter (p. 90) which drew the attention of the respondent to the fact that instructions were required as to the return of documents and storage of the goods in event of dishonor of the draft. On the day after the receipt of the draft, viz., January 23, the Port Arthur branch presented the draft to Clarkson & Co. for acceptance and it was accepted on January 30th (p. 23), and the respondent bank was notified by the Port Arthur branch on the same day of such acceptance (p. 35). Being a ninety-day draft, its maturity was then fixed as April 30th. The Russo-Japanese war was formally declared on February

10, 1904, although hostilities had commenced on the previous day, and from that time until Port Arthur fell on January 2, 1905, the investment of the place was complete and communication with the outside world cut off.

On April 30, 1904, the draft became due but was not paid. Under the Russian law, two days of grace were allowed and at the expiration of this period, viz., on May 2, 1904, the Port Arthur branch delivered the draft to a notary public at Port Arthur for protest and it was protested on the following day (p. 17).

In this state of affairs, the Port Arthur branch retained the protested draft to ascertain if communication with the outside world would be rtstored; but matters not having improved and being uncertain as to the future they, on May 26, 1904 (page 18), mailed the respondent a letter enclosing the protested draft and stating that it had been protested for non-payment. This letter also stated that the shipping documents were being retained pending receipt of instructions. The Seattle bank denies that it ever received this letter.

These facts which had transpired after Port Arthur was invested were not known to the outside world until after the fall of Port Arthur. At that time the Japanese authorities took possession of the papers and documents of the Port Arthur branch and retained them until March, 1906, when they were returned to the petitioner. During all this

time the Russo-Chinese Bank had no access to these papers.

Meanwhile the respondent bank entered into correspondence with the head office of the Russo-Chinese Bank at St. Petersburg in which the Seattle bank insisted that it had learned that Clarkson & Co. had paid the amount of the draft to the Port Arthur bank and demanded payment. The St. Petersburg bank answered that it had had no communication with Port Arthur and was unable to trace the matter. This protracted correspondence (pp. 52-56) finally culminated in a letter of October 12, 1904 (p. 66), in which the Seattle bank stated that if the St. Petersburg bank did not pay the money which they were informed had been paid to the Port Arthur branch, they would commence legal proceedings in the United States to enforce their rights (p. 66).

The St. Petersburg bank, being in ignorance of the facts and fearing that since their documents at Port Arthur were inaccessible they would be unable to produce any evidence in the event that such legal proceedings were instituted in the United States, paid the amounts here sued for to the respondent by check on Ladenburg, Thalmann & Co. of New York, and in the letter accompanying this check (p. 68) they said, after repeating that they had no knowledge of the conditions existing at Port Arthur:

> "It remains of course however understood that in case your above remittance proves not

> to have been paid for by Clarkson & Co. you are held responsible to refund the amount of our today's cheque."

The Seattle bank replied, under date of December 5, 1904, acknowledging receipt of the check for $36,013.70, but calling attention to the fact that this was only for the principal of the draft, and that there was still interest, collection and exchange charges due, amounting to $2298.49 additional. In this reply letter, the Seattle bank said (p. 69):

> "* * * We on our part agree upon return to us of both sets of bills, showing that the draft has not been paid, to reimburse you in the sum paid us, provided, that we were in no wise injured by the fact that your Port Arthur Branch has indefinitely held the bills after their maturity, at which time they could have been returned to us and we could have collected from the Steamship Company."

The petitioner from its St. Petersburg head office then sent this additional payment of $2298.49 with a letter (p. 70) in which it was said:

> "* * * It remains understood that in case your above remittance proves not to have been paid, you declare yourselves ready to refund us these $2298.49 with the $36,013.70 sent on 27/9 November, plus accrued interest."

and to this letter the respondent bank, under date of January 18, 1905, replied acknowledging receipt of the payment and agreeing that the guarantee contained in their letter of December 5th should also cover this amount (p. 70).

Upon the return of the bank's papers by the Japanese, it was for the first time ascertained by the respondent that the draft had not in fact been paid but had been returned protested for non-payment in May, 1904. A demand for the repayment of the money was then made (p. 72) and the bills of lading and other documents which had remained with the Port Arthur branch pending further instructions were tendered to the respondent. After some correspondence (pp. 74-78), respondent refused repayment, and this action was commenced.

The foregoing facts are condensed from the record as stated by the Circuit Court of Appeals on the first appeal (187 Fed. Rep. 80).

In addition to the foregoing evidence, which was shown by depositions, the petitioner also developed by the testimony of R. R. Spencer, manager of the respondent bank (p. 89), that this bank had never given any specific instructions to the Port Arthur branch concerning the custody of the flour; that the respondent bank was protected by a letter of guaranty from the Centennial Mill Company (p. 91); that upon demand, the Centennial Mill Company, on November 2, 1904, repaid, without discount, the money that it had previously been advanced on the draft, and that the Russo-Chinese Bank had never been paid anything in connection with this transaction, even for its collection charges (p. 91).

The Circuit Court of Appeals in its second decision which is now sought to be reviewed, affirmed the judgment below upon the single ground that there was some evidence to support the special verdict of the jury that the draft in question had in fact been paid to the Port Arthur branch. *No other phase of the case was discussed nor are the instructions of the court covering the law concerning this fact of payment mentioned in the opinion.* It is upon the error in these instructions that the petitioner now particularly relies, and for the purpose of demonstrating their importance we now summarize the testimony concerning the payment and non-payment of this draft.

The respondent to prove that the draft had not been paid showed:

1. By the testimony of the witness Friedberg, manager of the Port Arthur branch (p. 15), that the draft had not been paid in whole or in part; that it was protested for non-payment (p. 31) on May 3, 1904, and returned with the deed of protest to the respondent bank on May 26, 1904.

2. By the witness Drozdov, a clerk in the Port Arthur branch, that the draft had not been paid in whole or in part (p. 35); that a letter (p. 37) was written from the Port Arthur branch to the notary public requesting him to protest this bill; and that this witness kept all the books of the Port Arthur branch from January 1, 1904, to December 23, 1904 (p. 40).

3. By the witness Richter, that he was an employee of the Port Arthur branch from January 1, 1904, to the end of that year, and that he kept the register of accepted checks or drafts issued by the Port Arthur branch. He testified (p. 88):

> "* * * I know for a fact that such draft has not been paid by Clarkson; that it was protested, and the bill and protest sent to the National Bank of Commerce of Seattle, but has gone astray in consequence of the war."

4. By the books of the Port Arthur branch stated by the witness Friedberg (p. 14) to have been kept correctly and to include all the transactions concerned with the collection of the draft in question. These books show (p. 34) the receipt of this draft, the date of its maturity and the collateral, and under the head of "Payment" no annotation is made but the following appears: "Draft returned 13/V-'04" which under the Gregorian calendar would be May 26, 1904.

5. By the witness Clarkson, whose firm accepted this draft, and who said (p. 84):

> "I am unable, up to the present time, to say whether I was mistaken in my statement that the draft had been paid, or not."

As against this evidence of non-payment, there is no direct testimony. The respondent had no documentary evidence and but two witnesses—Davidson (pp. 130-161) and Short (pp. 101-130).

The witness Davidson had been discharged by Clarkson & Co. early in 1904 (p. 81), because

he had retained a portion of the proceeds of a cargo of flour belonging to the firm that he had sold to Ginsburg and Company (pp. 85-86). He finally left Port Arthur on February 17, 1904 (p. 147), more than two months before the draft matured. He knew nothing of any of the circumstances in connection with this particular draft (pp. 143-145).

The witness Short testified (pp. 114-115) that he did not have any personal knowledge concerning the payment of this draft; that he left the employ of Clarkson & Co. on February 4th (p. 114) and he finally left Port Arthur about February 14 or 15, 1904 (p. 142).

The *inferential* testimony relied upon by respondent to prove payment is as follows:

Short testified that when he accepted this draft, he gave the bank what he termed "a letter of guaranty" which recognized the flour as the property of the bank until paid for and which contained an agreement on the part of Clarkson & Co. to pay over to the bank the proceeds of the sales of the flour from time to time until full payment was made. He did not testify that Clarkson & Co. did in fact take possession of the flour or sell it. But the Court of Appeals on this phase of the case concluded that it was a fair "inference" that such course was taken. Such conclusion can be only a matter of inference for the reason that Short testified that he did not know what became of the "Hyades" flour. He testified (p. 119):

"Q. Do you know whatever became of the 'Hyades' flour?
A. The 'Hyades' flour?
Q. Yes.
A. I don't.
Q. Do you know whatever became of a single sack of it?
A. No, nothing other than what I have heard them testify to.
Q. Yes, but of your own knowledge, I mean?
A. No.
Q. You don't know anything about that at all?
A. I know that was in the warehouse of Clarkson & Company.
Q. Whether or not it was ever delivered out of the warehouse to anybody you can't say?
A. I cannot say.
Q. Whether or not the bank ever got any money for the draft you cannot say?
A. No, I cannot say.
Q. Yes.
A. I don't know."

Davidson testified that a custom had existed between the Port Arthur branch and Clarkson & Co. that the latter gave the bank a letter of guaranty and that the bills of lading would then be delivered. He was particular to state that Clarkson & Co. *were never allowed to take deliveries of cargoes until the bills of lading had been delivered* (p. 156). It is important to here note that the custom testified to by Davidson could not have been followed in the present instance, since the bills of lading were never delivered by the Port Arthur branch, but were produced by the plaintiff at the trial of this case.

II.

Specification of Errors.

1. The court erred in instructing the jury as follows: (Transcript, pages 170-171.)

> "If you find from the evidence in this case that plaintiff permitted Clarkson Company to take over the flour under such an arrangement as the defendant claims with the stipulation that the plaintiff was the owner of the flour and with the agreement that Clarkson & Company would account to the plaintiff for the proceeds of the sale of the flour, then I instruct you that such action on the part of the plaintiff constitutes in law a payment of the draft in question and the plaintiff cannot recover and your verdict must be for the defendant."

2. The court erred in instructing the jury as follows: (Transcript, pages 166-167.)

> "* * * The National Bank of Commerce paid to the Centennial Mill Company the amount of the draft, and that vested it with the title, the right to receive the money on that draft and the title to the flour. I should say that the bill of lading called for the delivery of the flour to the order of the consignor, the Centennial Mill Company, and when the bill of lading was endorsed in blank and delivered with the draft to the National Bank of Commerce, that vested in the National Bank of Commerce the title, the ownership of the flour. Delivery of a bill of lading drawn as this one was is the title, the same as a deed to a piece of property, a bill of sale, it amounted to a conveyance of the title to the holder of the bill of lading endorsed in blank. Delivery of the bill of lading was a symbolical delivery of possession merely while the flour was in the

ship, and the water houseman, after it had been landed and placed in a warehouse at Port Arthur, were bailees for the owner. The owner was the holder of the bill of lading and in law is deemed to be in possession as owner of the property. The National Bank of Commerce endorsed the draft so as to make it payable to the Russo-Chinese Bank at Port Arthur, and transmitted the draft thus endorsed with the other documents attached, to the Russo-Chinese Bank at Port Arthur, and it was received there by that bank. When the Russo-Chinese Bank at Port Arthur received the draft and the accompanying documents endorsed as they all were, and undertook the business of presenting and collecting the draft, it became invested with the title and ownership of the flour as to all of the world except the National Bank of Commerce of Seattle; it had the legal right to sell and dispose of that flour and to receive the proceeds subject to its duty as an agent to account to the National Bank of Commerce for it. In receiving the documents and undertaking the business in that manner, without special instruction in regard to the care of the flour and the protection of the National Bank of Commerce, it was left free to deal with the flour as an owner might. It was obligated as an agent to act in good faith to protect the rights of the National Bank of Commerce in the collection of the draft. It was authorized to do whatever was necessary in the manner of incurring expense, which would be chargeable against the property, and to be compensated out of the property in its hands, and it was required to deal with the property in the same way that an intelligent and prudent owner of property would deal with his own property, to act for and in place of the National Bank of Commerce in handling the business there at Port Arthur as the National Bank of Commerce would have acted if it had

been there, and in a position to act for itself. As the agent for the owner it was obligated to account for the amount of the draft, to account for the security which the bill of lading constituted, and it cannot be excused from obligation to account by saying that the flour disappeared without its knowledge, and require the defendant in this case in order to fasten an obligation upon it, to prove that it was negligent. A principal does not have to prove those things in regard to property or valuables that go into hands of an agent; the agent must render an account in order to be cleared of obligation and liability. This is the rule that is to be applied in this case in determining whether the plaintiff in this case paid out money which it was not obligated to pay to the defendant on account of the draft."

3. The court erred in refusing to instruct the jury as follows: (III, Transcript, pages 160-161.)

"I charge you that the Russo-Chinese Bank in this case, in acting as the collecting bank of the draft in question, and as the agency to transmit the documents in question, was bound to use only reasonable and ordinary care and diligence in the exercise of this relationship. In the absence of special instructions, it was not obliged to insure the flour, or see that the same was stored, or to make any inquiries concerning the custody and disposition of the flour. In the absence of special instructions its sole responsibility, as such collecting bank, was to preserve the documents safely, to promptly present the draft for acceptance, and upon nonpayment, to protest the same.

"The evidence in this case shows that the Russo-Chinese Bank did comply with all of the foregoing obligations imposed upon it by its relation, and that there were no special instruc-

tions given it by the National Bank of Commerce of Seattle, except to hold the documents against payment, which the Russo-Chinese Bank did. I therefore instruct you that there is no evidence of negligence against the Russo-Chinese Bank, so far as the disposition of the flour was concerned."

4. The court erred in refusing to instruct the jury as follows: (IV, Transcript, page 161.)

"A collecting bank, in the absence of special instructions, has no responsibility concerning the goods. Its sole obligation is with the documents."

5. The court erred in refusing to instruct the jury as follows: (....., Transcript, page 161.)

"I charge you that, in any event, the Russo-Chinese Bank in this matter was only bound to use reasonable and ordinary care and skill. It was not bound to use any extraordinary efforts in connection with the said documents and shipment. Thus, for example, there was no duty imposed upon the Russo-Chinese Bank to investigate as to who were the agents of the steamship line at Port Arthur, or as to whether or not Clarkson & Company were the agents of the steamship line, and there was, therefore, no negligence on the part of the Russo-Chinese Bank in failing to notify the National Bank of Commerce of Seattle that Clarkson & Company were the agents of the Steamship line at Port Arthur.

6. The court erred in refusing to instruct the jury as follows: (VIII, Transcript, page 162.)

"(3) The third affirmative defense set up by the defendant in its answer, is that it was, by the custom of bankers, made the duty of

the plaintiff to look after, protect and care for the flour represented by the bill of lading upon its arival at Port Arthur, and that it was the duty of the plaintiff to warehouse the flour and insure the same, and that it was the duty of the plaintiff, by reason of the instructions given plaintiff by defendant, and by reason of the custom among bankers, not to permit the said flour to be appropriated by Clarkson & Company, or any one else.

In this connection I charge you that there were no instructions given by defendant to plaintiff concerning the care of the flour, and that the only instructions given were to hold the documents against payment; that it was not the duty of the plaintiff to either look after, protect or care for the flour represented by the bill of lading upon its arrival at Port Arthur, or at all, and that it was not the duty of the plaintiff to warehouse the flour, or to insure the same, and that it was not the duty of the plaintiff to prevent the said flour being appropriated by Clarkson & Company, or by any one else."

7. The court erred in refusing to instruct the jury as follows: (IX, Transcript, page 163.)

"The evidence shows that the only instructions given to plaintiff by defendant, in regard to the draft and accompanying documents, was to hold them against payment. I instruct you that no custom or usage could impose additional obligations upon plaintiff in this regard than those imposed by this instruction from defendant to plaintiff. Also that defendant did not instruct plaintiff to insure or store the flour and that no custom or usage could impose this obligation upon plaintiff."

8. The court erred in refusing to instruct the jury as follows: (X, Transcript, page 163.)

> "If you shall believe that the Russo-Chinese Bank was negligent in any respect in regard to its duties in the premises, then I charge you that it is liable, if at all, only for such actual damages as were directly suffered by the Seattle Bank by reason of such negligence. That is, even if you believe that it was the duty of the plaintiff to insure and store this flour and take it out of the control of Clarkson & Company, but that nevertheless if plaintiff had done these things, the flour would have been lost or destroyed by reason of the war conditions at Port Arthur, then I instruct you that such negligence cannot be considered by you, but that plaintiff is entitled to recover regardless of such negligence."

9. The Court erred in refusing to instruct the jury as follows: (XI, Transcript, page 163.)

> "In relation to the payment by Clarkson & Company to the Russo-Chinese Bank of the sum of 67,000 roubles, which had been obtained from Ginsburg & Company, I instruct you that the Bank, in applying such payment, was controlled by the instructions then given it by Clarkson & Company, and that the Bank did not have any right to apply this money, or any part thereof, to any drafts, or any other account, than as specifically directed by Clarkson & Company.
>
> I furthermore instruct you that if there had been no directions given by Clarkson & Company, the Bank would not have had the right to hold the same against a draft which was not then payable.
>
> I furthermore instruct you that the Bank had no right to accept a partial payment for the

draft, and deliver the bills of lading upon such partial payment. It was the duty of the Bank to hold these documents until the draft was fully paid. The sum of 67,000 roubles was not sufficient to pay in full the draft in question, and therefore I instruct you that even if all this money had been paid in by Clarkson & Company for the payment of this draft, the Bank would have had no right to deliver the documents until the remainder of the draft had been paid."

10. The court erred in refusing to instruct the jury as follows: (XII, Transcript, page 164.)

"In considering the duty of the Russo-Chinese Bank to notify the National Bank of Commerce of Seattle of the fact that Clarkson & Company were the agents of the steamship company, I instruct you that if you believe that the Russo-Chinese Bank did not, at that time, know such fact, or if you believe that the Centennial Mill Company, or its representatives, did, at that time, know such fact, then there was no necessity for the plaintiff to give any notice to the defendant concerning the same.

I furthermore instruct you that there was no duty imposed upon the plaintiff whatever, in connection with this transaction, until after it had received the draft in question, which the evidence shows was on January 22, 1904; that unless the Bank had special cause to believe that, at that time, Clarkson & Company were insolvent, or intended in some way to illegally remove the flour from its warehouse, there was no duty whatever imposed upon the plaintiff Bank to send any notice of these things to the defendant.

I furthermore instruct you in this connection, that if you believe that the representative of the Centennial Mill Company was present in

Port Arthur during a portion of the time that this flour was in the warehouse of Clarkson & Company, and if the Russo-Chinese Bank knew that this representative was so present on the business of the Centennial Mill Company, then there was no obligation imposed upon the Russo-Chinese Bank to give any notices or make any inquiries concerning the disposition of the flour, because it had a right to believe that all of such matters were being attended to by the representative of the Centennial Mill Company."

11. The court erred in admitting the following evidence: (Testimony R. R. Spencer, Transcript page 92.)

"Q. Now, Mr. Spencer, counsel has directed your attention to the letter of January 9/22, 1904, addressed by the Russo-Chinese Bank to the National Bank of Commerce, in which there are certain printed sections beneath the letter or in the letter, in which it is stated that 'Unless otherwise instructed, bills of any description sent to us for procuring acceptance or for collection will be protested both for non-acceptance or non-payment and immediately returned to the sender.' Regardless of that provision which I have just read to you, I will ask you what the custom is among bankers, and what is the commercial usage among bankers, with regard to the return of the documents when drafts are protested, or otherwise?

A. They are supposed to protest the draft for non-acceptance and non-payment and it is customary where large amounts are involved, to cable the fact that the draft has been protested for non-acceptance or non-payment. No cablegram was sent to us regarding that matter from Port Arthur."

12. The court erred in admitting the following evidence: (Testimony R. R. Spencer, Transcript pages 92-93.)

"Q. I want to call your attention to the second subdivision of the printed matter contained on the letter to which I have just referred, which reads as follows: 'When sending us for collection documentary bills or only documents, clearly state in your letter accompanying same whether in case of dishonor:—(*a*) both bill and documents are to be promptly returned with the relative deed a—protest, or *(b)* if the bill is to be returned and the relative documents are to be kept here at your disposal or (*c*) if the goods are to be stored by us and fire insurance is to be covered pending receipt of your instructions.

I will ask you, Mr. Spencer, to state what the commercial usage among bankers, is, between the forwarding bank and the collecting bank, as to the duty or custom of the collecting bank to return the documents upon the dishonor of the draft, either for non-payment or for non-acceptance and the documents accompanying them.

A. They will hold all documents until they receive an answer. It is ordinarily customary for them to hold the draft and documents until they can receive advice, especially the bills of lading, in order that they may be able to take action in regard to the goods. I am speaking now in any event that they cable us we would give them specific instructions as to what to do. The reason those instructions are not included in our letter is from the fact that we never know what contingency may arise, consequently we leave it to their judgment to take such steps in the event of any contingency as they would take to protect their own property, by advising us."

13. The court erred in denying the motion to strike from the foregoing answer the last sentence thereof. (Transcript page 93.)

14. The court erred in admitting the following evidence: (Testimony R. R. Spencer, Transcript pages 93-94.)

> "Q. In the absence of instructions, what is the commercial usage in regard to the return of the documents? Suppose there is no telegraphic communication, they don't advise of the fact of the dishonor, the forwarding bank knows nothing about it, what is the duty of the bank upon the dishonor of the paper, and what is the custom in regard to the return of the draft and the documents?
>
> A. The custom would be to return the draft —protest and return the draft, either for non-acceptance or payment, as the case might be."

15. The court erred in admitting the following evidence: Testimony R. R. Spencer, Transcript page 94.)

> "Q. What is the custom, in case of the dishonor of a draft or non-payment, of the collecting bank, in the absence of instructions, in regard to storing and protecting the goods?
>
> A. They are expected to use diligence in taking such steps in regard to storage, insurance and so forth as they would take were the property their own and under their own immediate—and in their own immediate possession."

16. The court erred in denying the motion to strike out the foregoing answer. (Transcript, page 94.)

17. The court erred in admitting the following evidence: (Testimony R. R. Spencer, Transcript page 94.)

> "Q. As I take it, then, Mr. Spencer, these requirements or these suggestions that the Russo-Chinese Bank made to you as to what you should tell them when you sent the draft, what to do with it in case of dishonor, as I understand you the commercial usage would control that regardless of whether you told them to do so or not?
>
> A. Yes, sir."

18. The court erred in admitting the following evidence: (Testimony R. R. Spencer, Transcript page 95.)

> "Q. In the case of flour, Mr. Spencer, sent to a foreign country, with a draft, 30-day draft or a time draft payable at sight, attached to a bill of lading, what is the course of business as between banks with regard to the custody of the flour during the time intervening from the presentation and acceptance of the draft, if it should be accepted, and the date when the payment on the draft would be due?
>
> A. The goods are supposed, or are, or at least should be stored in an independent warehouse, that is, a warehouse that is free from the interference of the consignee of the goods. Ordinarily the policies of insurance follow the draft, so that the bank has knowledge that the goods are insured. If the goods are deliverable upon acceptance and the party accepts the draft, of course he takes the bills of lading and the sending bank or the drawer assumes all liability from then on. If the drafts are payable—if the draft is drawn 'Delivery of documents on payment only' then it is the duty of the bank, so far as it can exercise it by reasonable

diligence, to hold possession indirectly, by warehousemen, of those goods, until it delivers the bill of lading or the warehouse receipts which are substituted for the bill of lading.

19. The court erred in admitting the following evidence: (Testimony W. S. Davidson, Transcript page 132.)

"Q. What is the custom of bankers with reference to presenting drafts for acceptance?
A. As soón as the bank receives the draft it is customary for them to request the drawee to accept it, either by asking the drawee to come to the bank or sending it around to his office."

20. The court erred in admitting the following evidence: (Testimony W. S. Davidson, Transcript pages 132-133.)

"Q. What is the established custom among bankers at Oriental ports with reference to the handling of drafts with bills of lading and documents attached, when the drafts are in their hands for collection?
A. The established custom among bankers in the Orient is not to part with the documents until the drafts have been paid, if the documents are only deliverable against payment. It often happens, however, that the firm upon which the draft is drawn has a good credit with the bank and under those circumstances the bank delivers the documents against acceptance and thereby accepts responsibility."

21. The court erred in admitting the following evidence: (Testimony W. S. Davidson, Transcript pages 133-134.)

"Q. What is the custom of the Russo-Chinese Bank upon the arrival of shipments where drafts with bills of lading *are* attached are in their hands for collection?

A. The custom of the Russo-Chinese Bank at Port Arthur was to see that the cargo was stored and insured and the managers of the Russo-Chinese Bank have frequently come to the office of Clarkson & Company to ascertain if certain cargo was properly stored and have taken out fire insurance with some of the fire insurance companies for which Clarkson & Company acted as agents, on such cargo."

and in denying the motion to strike from the foregoing answer the portion thereof commencing with the words "and the managers of the Russo-Chinese Bank" to the end of the answer (p. 134).

22. The court erred in admitting the following evidence: (Testimony W. S. Davidson, Transcript pages 134-135.)

"Q. In transactions taking place between the firm of Clarkson & Company at Port Arthur and the branch of the Russo-Chinese Bank at Port Arthur, were these customs strictly observed?

A. These customs were not strictly observed as the Russo-Chinese Bank at Port Arthur allowed Clarkson & Company to have the bills of lading and other documents attached to the draft before the draft was paid. This only happened I might say when the amount involved was a considerable amount such as would be the case in flour shipments."

23. The court erred in denying the motion to strike from the foregoing answer that portion

thereof after the word "allowed". (Transcript, page 135.)

24. The court erred in admitting the following evidence: (Testimony W. S. Davidson, Transcript pages 135-136.)

"Q. Why would the bank permit this to be done by Clarkson & Company?

A. Because the firm of Clarkson & Company was established at the instigation and with the assistance of the Russo-Chinese Bank in Vladivostok in 1897. Mr. Clarkson went to Vladivostok about that time and then *then* managers of the Russo-Chinese Bank at Vladivostok requested him to establish what they called an American firm and the Russo-Chinese Bank found him a Russian partner. Neither Mr. Clarkson or his Russian partner put one cent of capital into the firm. Notwithstanding this the Russo-Chinese Bank opened credits for the firm of Clarkson & Company for a sum of over a million roubles. Towards the end of the year 1898 when the firm of Clarkson & Company had been established one year, roughly speaking, Mr. Clarkson was absent from Vladivostok and I was in charge when the bank, the Russo-Chinese Bank, presented a statement of accounts showing that the firm of Clarkson & Company owed the Russo-Chinese Bank approximately eight hundred thousand roubles. I thereupon looked into matters and particularly the accounting department, with which I had not concerned myself previously, and found that there was absolutely no books showing what credits had been opened or what sums had been drawn against any particular credit. In other words, there was no means of refuting or corroborating the statement presented by the Russo-Chinese Bank so I could do nothing. Upon Mr. Clarkson's return from Port Arthur the matter

was gone into and rather than employ the services of a chartered accountant to go over the books and the transaction in detail, he preferred to accept liability according to the Russo-Chinese Bank's statement for this eight hundred thousand roubles. There were goods in hand representing a value of approximately three hundred to four hundred thousand roubles and therefore there had been a loss on the first year's business of between three hundred and four hundred thousand roubles. Clarkson & Company continued to owe the Russo-Chinese Bank this huge sum for many years and it was on account of this debit balance that the bank, the Russo-Chinese Bank, afforded these special facilities for doing business to Clarkson & Company."

25. The court erred in denying the motion to strike from the foregoing answer all that portion following the words "Mr. Clarkson went to Vladivostok." (Transcript, page 136.)

26. The court erred in admitting the following evidence: (Testimony W. S. Davidson, Transcript page 137.)

"Q. What was the practice of the Russo-Chinese Bank at Port Arthur in dealing with Clarkson & Company in reference to these shipments from the Centennial Mill Company?

A. The Russo-Chinese Bank invariably during my connection with the firm of Clarkson & Company surrendered the bills of lading and other shipping documents on acceptance of the draft. Afterwards upon the sale of flour by Clarkson & Company the proceeds of such sales were put into the Russo-Chinese Bank and when the sums so paid in were large enough it was customary to ask the bank to telegraph

the equivalent of these sums in American currency to America in order to avoid further interest charges."

27. The court erred in admitting the following evidence: (Testimony W. S. Davidson, Transcript page 138.)

"Q. State fully and in detail the custom between Clarkson & Company and the Russo-Chinese Bank with reference to the handling of flour covered by documents held by the bank? And state whether or not the Russo-Chinese Bank consented to the sale of the flour on the 'Hyades' by Clarkson & Company prior to the payment of the drafts?

A. As soon as the draft reached the Russo-Chinese Bank it was customary for the Russo-Chinese Bank to inform Clarkson & Company of its arrival and then this notification was given by a request from the bank that it should be accepted. The draft usually arrived some time before the goods and it was usual to accept it before the steamer carrying the goods had arrived in port. Upon the arrival of the steamer carrying the goods in port some one in authority from Clarkson & Company would go to the Russo-Chinese Bank and make arrangements to get the documents attached to the draft upon acceptance of the draft and invariably this was accomplished. The Russo-Chinese Bank when surrendering documents before the draft was paid required that a letter of hypothecation should be signed by Clarkson & Company. I have no copy nor original of such letter nor do I know where one can be found as all such letters were delivered to the bank, Russo-Chinese Bank, at the time they were signed but I do

know that in substance these letters stated that the goods belonged to the Russo-Chinese Bank and that the consignee agreed to pay to the Russo-Chinese Bank the proceeds of all sales when and as made. On or about the 15th day of February, 1904, the Russo-Chinese Bank did consent to the sale of the flour ex steamship 'Hyades,' if that is the name of the steamer that arrived at Port Arthur on or about the 8th of February, 1904."

28. The court erred in denying the motion to strike out that portion of the foregoing answer commencing with the words "On or about the 15th day of February, 1904," through the remainder of the last sentence. (Transcript, pages 138-139.)

29. The court erred in admitting the following evidence: (Testimony W. S. Davidson, Transcript page 140.)

"Q. If you state that there was such a custom requiring a written instrument to be executed by Clarkson & Company to the bank, state how long this custom had been in force and whether the transaction covering the shipment of the Centennial Mill Company on the 'Hyades' was covered by such custom? In other words, did Clarkson & Company execute such written instrument in case of the shipment in question as in other cases to which you have referred in your deposition?

A. To the best of my recollection this custom was instituted and inaugurated towards the end of the year 1901 or at the beginning of 1902. It is impossible for me to say positively that the Russo-Chinese Bank required such an instrument for the shipment in question. All

that I can say is that it was the custom for the Russo-Chinese Bank to demand such an instrument for all shipments arriving under similar circumstances."

30. The court erred in denying the motion to strike out from the following answer: (Testimony W. S. Davidson, Transcript page 145.)

"Q. Do you know whether this draft drawn by the Centennial Mill Company and in the hands of the branch of the Russo-Chinese Bank at Port Arthur covering this shipment of flour was ever actually paid?

A. No; I have no knowledge, definite knowledge, that it ever was paid since I left Port Arthur long before it fell due, but if it was not paid by Ginsburg & Company then it was the fault of the Russo-Chinese Bank because the firm of Ginsburg & Company to my definite knowledge have ever since been able to pay this draft and if for any reason the arrangement I made with Ginsburg & Company was avoided or not carried out then the Russo-Chinese Bank had it within their right and power to demand the surrender of the keys to the warehouse from Ginsburg & Company."

All that portion thereof commencing with the words "but if it was not paid" continuing through the remainder of the sentence and answer.

31. The court erred in admitting the following evidence: (Testimony Arthur T. Short, Transcript page 106.)

"Q. Now, in all your dealings with the Russo-Chinese Bank, in handling the other shipments of the Centennial Mill Company, I will ask you

what arrangement if any was made with the bank in regard to the handling of this flour?

A. Well, from the year 1900 the same rule existed. We always gave the bank a letter of guaranty against—a letter of guaranty to take delivery of the cargo and the cargo belonged to them until it was paid for, and we sold it out and deposited the money in the bank from time to time as Clarkson & Company got it in."

32. The court erred in refusing to strike out the following sentence from the answer of the witness Short: (Transcript, page 108.)

"The object of getting a ninety days' sight draft was that we could get delivery of the flour without payment, and that we paid in the money as soon as we got it—as soon as the flour was sold the money was collected in."

33. The court erred in admitting the following evidence: (Testimony Arthur T. Short, Transcript pages 109-110.)

"Q. I will ask you what if any arrangement was made with the Russo-Chinese Bank in regard to the flour securing the $4,136 draft and the one securing the $16,155 draft?

A. The same arrangement as was made with the 'Hyades'; that was an arrangement which had been going on from the time I went there."

34. The court erred in denying the motion to strike out the testimony of the witness W. S. Davidson concerning the specific arrival of the steamer and also all his statements concerning the transactions with Ginsburg. (Transcript, page 159.)

III.

Argument.

1. *The instruction that permission given Clarkson to take the flour constituted a payment of the draft is manifestly erroneous.* (Specification of Error 1.)

The first specification of error is predicated upon the inherent vice in the instruction wherein and whereby the court, in declaring that certain acts would constitute payment, practically directed the special verdict. Since we propose to discuss this specification of error somewhat fully, we again quote the objectionable instruction at this point for more convenient reference:

> "If you find from the evidence in this case that plaintiff permitted Clarkson Company to take over the flour under such an arrangement as the defendant claims with the stipulation that the plaintiff was the owner of the flour and with the agreement that Clarkson & Company would account to the plaintiff for the proceeds of the sale of the flour, then I instruct you that such action on the part of the plaintiff constitutes in law a payment of the draft in question and the plaintiff cannot recover and your verdict must be for the defendant."

The arrangement declared in this instruction to have been equivalent to a payment of the draft was said by the witness Short (the only witness for either side upon this subject) to have been made at the same time that he accepted the draft. If the court's instruction be

correct, this acceptance was an idle act, because the obligation under the acceptance was created and extinguished at the same moment and a new obligation substituted in its place. The trial court proceeded upon the assumption that there was a novation, but such assumption must necessarily be premised upon the proposition that the new obligation extinguished the claim against Clarkson & Company on the accepted draft.

The pleadings, the testimony and the conduct of the parties conclusively demonstrate the contrary.

The definition of a novation is said in the American & English Encyclopedia of Law, vol. 21, p. 661, to be correctly stated in the *California Civil Code*, section 1531, which is as follows:

> "§ 1531. Novation is made:
>
> "1. By the substitution of a new obligation between the same parties, with intent to extinguish the old obligation;
>
> "2. By the substitution of a new debtor in place of the old one, with intent to release the latter; or,
>
> "3. By the substitution of a new creditor in place of the old one, with intent to transfer the rights of the latter to the former."

There was here no new or third party to the guaranty. The parties remained the same as those named in the draft. The first subdivision above designated, to wit, the substitution of a new obligation is the only possible ground therefore to urge that a novation was here effected. In such case it is plain that the original agreement of which nova-

tion is sought must be absolutely extinguished and the new agreement substituted for it.

Wharton v. Walker, 4 B. & C. 164;
Hyde v. Booracm, 16 Pet. 169;
Union Bank v. Stafford, 12 How. 327.

The pleadings in this case do not count upon any novation, and if it is claimed that a contract has been extinguished by a novation, such fact must be pleaded. The only affirmative defenses set forth in the amended answer are (pp. 8-11), (1) that the draft was paid in full by Clarkson & Co.; (2) that the Russo-Chinese Bank did not present the draft for acceptance within a reasonable time and that it became the duty of the collecting bank to look after the flour and to warehouse and insure the same; (3) that if the proceeds from the sale of the flour were not used toward the payment of the draft, the failure to have the same so applied was due to the carelessness and negligence of the collecting bank, in that the draft was not protested at the date of its maturity and that the draft and documents accompanying the same were not returned to the Seattle bank, but that on the contrary it was indefinitely held "to the great injury and damage of this defendant". These allegations in the answer do not proceed upon any assumption that the obligation of the acceptor of the draft was extinguished by the creation of a new obligation, but to the contrary expressly affirm a continuing liability on the draft until it was paid.

Nor was the case tried upon any such theory. If this instruction of the court is correct, it was not necessary that defendant produce any testimony other than to show that this arrangement concerning the letter of guaranty was made. Immediately thereupon under this instruction all obligation on the draft ceased, and this notwithstanding the fact that it was at the same moment accepted, retained by the collecting bank, and subsequently protested for non-payment. This instruction compels the absurd conclusion that the draft was paid the moment that it was accepted. If it had been the intention of the parties to substitute a new obligation for the old one, the draft would not have been accepted but would have been returned cancelled to Clarkson & Co. The "arrangement" referred to in the instruction was that as the flour was sold from time to time, the proceeds would be turned into the bank by Clarkson & Co. *to be applied on the draft.* This, of course, carries with it the assumption that the obligation under the draft was still an existing and the primary obligation. If the proceeds resulting from the sale of all the flour were paid into the bank, and a deficiency resulted, Clarkson & Co. would still be liable for this deficiency on the draft, not on the guaranty, because the guaranty under such circumstances would have been fully carried out. Then the subsequent conduct of the parties, as shown by the presentation of the draft for payment and protest thereof and remailing to Seattle, are equally inconsistent with any theory

that the draft was deemed paid and a new obligation on the guaranty substituted. Short testified that the very object of Clarkson & Company in getting a 90-day draft was to permit of its obtaining delivery of the flour through the letter of guaranty and thus availing itself of the proceeds of the flour with which to pay the draft (Trans. p. 108). A novation, therefore, was neither claimed nor proven.

If we assume that the Port Arthur branch did, contrary to its instructions, permit Clarkson to take over the flour, then to the extent of the value of the security that was thereby released it may have been responsible. There might have been a conversion so far as the released flour was concerned, but this conversion could not extend further than the amount and value of the flour so released.

Commercial Bank v. First State Bank, 153 S. W. (Texas) 1175.

If a pledgee converts collateral to his own use, it may operate as a payment of the claim *to the extent of the value of the converted collateral, but no further.*

Randolph on Commercial Paper, 2nd Ed., Section 795;

Hunt v. Nevers, 32 Mass. 504;

Alden v. Camden Anchor-Rockland Mach. Co. (Maine), 78 Atl. 977.

It is useless to speculate whether Clarkson & Co. were able to pay this draft independent of the security since under the theory of the trial court

the draft was paid immediately upon permission being given to take possession of the flour. But if this conclusion of the trial court be not followed, then although the bank did without warrant release the security, still no damage resulted to the Seattle bank if Clarkson & Co. were in fact able to pay their draft. There is abundant evidence in the record that Clarkson's financial standing in Port Arthur at this time was good. Short himself testified (p. 111) that Clarkson always had sufficient money on his books and cargo in the go-downs to cover any liabilities that he might have.

There is no showing that the Seattle bank ever attempted to enforce payment of this draft from Clarkson & Co., or even made any demand therefor. It could not, therefore, be *presumed* that by the release of the security the draft was made valueless. Clarkson & Co. having accepted the draft became its principal debtor, and definitely agreed to pay it ninety days from that date. Thereafter the bank held the documents as security only for the debt and was the pledgee thereof. If it released this pledge in whole or in part, the debt could not be paid to a greater extent than *the value of the property so released.* But under this instruction the jury were told that they must consider that the draft was in law paid regardless of the value of the cargo of flour. The instruction can mean only that if security be released, *whatever its value,* then the principal obligation is *ipso facto* discharged regardless of its amount.

The court could not say as a matter of *law* that the flour even if all of it was proved to have been irretrievably lost, was worth more or less than the face amount of the draft, since this was a *question that the jury were entitled to pass upon,* and the evidence on the subject is not free from contradiction. Thus the respondent's witness Davidson testified (p. 151):

> "There was no market price for flour at that time. The Russians were too busy saving their skins to think of establishing a definite price for edibles as is usual in cases of besieged port."

and, also (p. 143):

> "* * * I want to state right here that I saw with my own eyes that afternoon a very considerable quantity of flour being stolen which it was impossible for me to prevent. The whole town was in a chaotic state and the people were, more particularly the Chinese, looting everything in sight."

Under the most favorable light for the respondent, and assuming the truth of all of Short's testimony, it can show nothing more for the respondent than that a collecting bank without authority has permitted the consignee to take over the security. On this showing the trial court has charged the jury that they must consider the draft as having been at once paid without any consideration on the part of the jury as to the value of the security lost, or whether it was, indeed, lost at all. This instruction, therefore, would not have been correct even if without contradiction defendant had

shown that the Port Arthur bank had without right delivered to Clarkson & Co. these bills of lading and followed this up by evidence that the flour had been sold to other parties and disappeared. Even in such extreme case, it would have been necessary that the court qualify its instruction as to payment by the proviso, "If you consider the value of the property so lost equivalent to the amount due upon the draft", or words to that effect.

But the claimed error in this instruction now stands out in sharper relief than it would if the facts assumed in the preceding paragraph had been shown. For there is here no proof whatever that the flour was in fact taken over by Clarkson and sold by him. The evidence stops with proof of the agreement that the flour *might* be sold from time to time under a letter of guaranty that its proceeds would be accounted for.

It seems obvious that the respondent, in order to uphold this instruction, must take one of the two horns of a dilemma. It must either claim that the obligation on the draft was completely extinguished when the letter of guaranty was given (in other words, a novation), or that it is the law that whenever a collecting bank releases security under such circumstances, it becomes *ipso facto* and at once liable for the full face amount of the draft, regardless of the value of the security so released.

For it is to be duly noted that the instruction does not even contain the condition or element that to constitute payment of the draft the

flour delivered must be of a value equal to the face of the draft. The only fair intendment of the instruction is that, however valuable or valueless the flour was, the surrender of it to the consignee in return for the agreement to account for its proceeds immediately and *ipso facto* satisfied the indebtedness which accrued through acceptance of the draft. This would logically reduce the instruction to the absurdity that if the proceeds of the flour only amounted to one-half the indebtedness evidenced by the draft there would, notwithstanding the acceptance of the draft by Clarkson & Co., be no further claim against Clarkson & Co. It is perhaps unnecessary for us to remark that the fact that there may be some evidence in the record from which the jury might have been warranted in drawing the inference that the flour was of a value commensurate with the draft in no way lessens the vice in the instruction. The court did not make any such condition a part of the instruction and, consequently, the jury cannot be presumed to have drawn such an inference when it was in fact not bound to draw any inference or consider the question of value at all.

That the trial court itself had in mind that it was not the release of the security, but the application of the proceeds that would pay the debt on the draft *pro tanto* is shown by another instruction given to the jury, which is as follows:

> "It is a general rule of law that where collateral security is received for a debt with

power to convert the security into money, this is specifically applicable to the payment of such debt; the same person being the party to pay and receive, no act is necessary and the law makes the application. If the proceeds equal or exceed the amount of the debt it is de facto paid; no action would lie for it, and proof of these facts would support the defense of payment. And if you find from the evidence in this case that the plaintiff did consent to Clarkson taking over the flour in question and consented to the sale of the same by Clarkson & Company, and then Clarkson & Company sold the flour in question and paid over the proceeds thereof to the plaintiff, then such payment of the proceeds of the sale of such flour to the plaintiff operated as a payment of the draft in question,—provided the proceeds of the sale of the flour equaled the amount of the draft; and if such proceeds did not equal or exceed the amount of the debt then it was a payment pro tanto—that is a payment of so much of the said draft as the proceeds of the sale of the flour would pay of the same; and this is the law, notwithstanding the fact that plaintiff may have received the proceeds of the sale of said flour and placed the same to the credit of Clarkson & Company in its bank, and permitted Clarkson & Company to use said funds for other purposes" (p. 171).

In the instruction specified as error, the jury were told that if the collecting bank permitted Clarkson & Co. to take over the flour under this arrangement, and with the agreement that Clarkson & Co. would account for the proceeds of its sale, then that such action constituted in law a payment of the draft. The instruction last quoted stated that if Clarkson & Co. sold the flour in question *and*

paid over the proceeds thereof to the bank, then that such payment operated as a payment of the draft *pro tanto.*

The instruction specified as error is not cured by the later instruction, but on the contrary is its error thereby emphasized. The one dealt with the effect of the mere execution of the agreement; the other with the results that followed if Clarkson did in fact sell the flour and pay into the bank the proceeds resulting from such sale.

The first instruction was not coupled with the second, but as an independent proposition of law stated that if the jury found that this arrangement was made they should find a verdict for the defendant—that the mere making of the agreement discharged Clarkson & Co. from its obligation as acceptor of the draft. If this arrangement was made, the jury were told in effect, it was quite immaterial whether or not any of the flour was ever sold or any money realized by the bank. There was no qualification attached. But the second instruction dealt with a different phase of the case, It was concerned primarily with a situation in which it was shown that Clarkson & Co. had actually paid to the bank some of the proceeds resulting from the sale of the flour. The application of funds so received by the bank was declared to be payment *pro tanto.* This is hopelessly irreconcilable with the proposition that the "arrangement" itself constituted payment. If the later instruction was indeed correct, the injury from the erroneous instruction is

obviously not overcome thereby. In the language of the Circuit Court of Appeals in *Armour & Co. v. Russell,* 144 Fed. 614, at page 616: "The vice of a wrong rule in a charge of the court is not extracted by the fact that the right rule was also given therein, because it is impossible to tell by which rule the jury was governed."

The instruction specified as error is inseparably connected with the special verdict, and if erroneous the special verdict did not cure such error. This court has said:

> " * * * it is impossible to say that the defendant's case was not injuriously affected by the admission of the evidence, and, while an appellate court will not disturb a judgment for an immaterial error, yet it should appear beyond a doubt that the error complained of did not and could not have prejudiced the rights of the party duly objecting."
>
> *Boston & Albany R. R. Co. v. O'Reilly,* 158 U. S. 334.

And it was said by the Circuit Court of Appeals for the Eighth Circuit, in *Atchison, T. & S. F. R. Co. v. McClurg,* 59 Fed. 860:

> " * * * unless it clearly appears from the face of the record that the error was harmless, we are not allowed to speculate as to its probable consequences."

In *Deery v. Cray,* 5 Wall. 795, this court said:

> " * * * We concede that it is a sound principle that no judgment should be reversed in a court of error when the error complained of works no injury to the party against whom

> the ruling was made. But whenever the application of this rule is sought, it must appear so clear as to be beyond doubt that the error did not and could not have prejudiced the party's rights. In the case before us this is not so clear."

Not only does it not appear beyond a doubt that this instruction did not prejudice, but the contrary is manifest. The learned Circuit Court of Appeals did not pass upon the validity of this instruction, expressly stating that any error therein was without prejudice on account of the special verdict of the jury, that the draft had in fact been paid. This was the extent of the opinion. We here respectfully urge that the validity of the instruction must be now considered notwithstanding the special verdict *because it was the authority for that verdict.* In this instruction the trial court stated to the jury the law as to what constituted a payment of the draft. The jury were told that they must consider that the "arrangement" in question if made was equivalent to and resulted in a payment, and that upon proof of such arrangement the verdict *must* be for the defendant. It was equivalent to a direction for a verdict in favor of the defendant. Without doubt the jury found that this draft had been paid because they believed the testimony of Short concerning the arrangement, and this alone compelled the verdict. So if the instruction be erroneous, the verdict must necessarily fall.

So far then as this particular instruction is concerned, it is not necessary to invoke the rule as

stated in the preceding citations, that prejudice will be presumed from error. This erroneous instruction was in effect the same thing as the special verdict. One is the cause and the other the effect. And to say that this effect cures the error in the cause is to at once lay down the principle that no error in any instruction can ever prejudice because it is cured by the verdict based thereon.

2. *There was error in the instruction to the jury, to the effect that the collecting bank became invested with the title and ownership of the flour, and that it was obligated to account for the amount of the draft and could not be excused from obligation to so account by saying that the flour disappeared without its knowledge. In this connection is discussed the refusal of the court to charge that the duty of the collecting bank was one of an agent.* (Specifications 2, 3, 4, 5, 6.)

The second specification of error is predicated upon the instruction that the legal title to the documents and to the flour became vested in the petitioner, and that it could not be excused from its obligations to account by "saying that the flour disappeared without its knowledge and require the defendant in this case, in order to fasten an obligation upon it, to prove that it was negligent". This instruction appears at pages 166-167 of the transcript and is quoted in full in the foregoing specifications. (Specification of Error 2.)

It is submitted that the trial court therein placed before the jury an erroneous statement of the law as to the relations existing between the two banks; that the Port Arthur branch was not the owner either of the documents or the flour for two reasons: (a) That the relationship between these banks was that of principal and agent, and not of vendor and vendee; and, (b) Because the documents were accompanied by an invoice or a bill of sale from Centennial Mill Company to Clarkson & Co., showing that the Port Arthur branch was acting as a collection agent only and that it could not sell the flour to anyone other than Clarkson.

As to the general duties of a collecting bank under like circumstances it is said in *Grant on Banking* (Sixth Edition), page 53:

> "The duty of the collecting banker as to bills and cheques paid in for collection is to present them for acceptance when necessary, and for payment to the proper person. The collecting banker must also give notice of dishonor with regard to any bills and cheques dishonored on presentation by him."

Morse on Banking (4th Ed.), Sec. 217, says:

> "Indorsement for collection does not give the bank title to the paper, nor render the depositor liable as an endorser, nor guarantee the drawer's signature. But the bank is deemed the holder, to receive and transmit notice of non-payment."
>
> Sec. 218. "A bank contracts to use due diligence in the business of collection, and it is 'bound only to reasonable care and diligence in the discharge of its assumed duties. In a case

of doubt its best judgment is all the principal has a right to require'. *Especially if the doubt arises by reason of the neglect of the principal to give specific instructions,* the bank will be acquitted even if its discretion be exercised erroneously."

In *Second National Bank of Baltimore v. Bank of Alma* (Ark.), 138 S. W. Rep. 472, a draft with bill of lading attached had been sent the bank with instructions to deliver it upon payment. The court said:

> "By accepting for collection the draft accompanied by the bill of lading, the plaintiff only became the agent of the Judge Machine Company for that purpose, *and it did not thereby become the true owner of the draft or of the machine which was covered by the bill of lading accompanying the draft.*"

Nebraska &c. v. First National Bank of Falls City (Neb.), 110 N. W. Rep. 1019.

In this case the court was called upon to pass upon the question as to the nature of the title to a draft and bill of lading sent a collecting bank. It was said:

> "We adopt, without qualification, the contention of counsel for appellant that the principles of the law merchant are without applicability to the case made by the petition, and that the latter is to be decided in accordance with the rules of law governing the relation of principal and agent, and, having adopted it, there appears to us no doubtful problem for solution. The functions and obligations of a collecting agent, merely as such, do not differ essentially or characteristically from those of a messenger boy.

What may be his moral or social standing or financial responsibility are, so long as he is free from knowledge or participation in any wrong-doing by his principal, matters of no importance. *He performs his whole duty by delivering what he is charged with delivering and receiving what he is intrusted to receive, in exchange, and by disposing of the latter as his principal has directed. It is not only not his duty, but it would be an impertinence by him, to inquire into the value, genuineness, or validity of either the one article or the other*" (p. 1020).

In *Hambro v. Casey*, 110 U. S. 216, this court said that a collecting bank holding a draft sent it for collection was the holder of the bills.

> "but in no legal sense the owners, though it may be their lien is for more than can be collected from the drawers or drawees."

In *Balbach v. Frelinghuysen*, 15 Fed. Rep. 675, it was held that a check deposited in a bank by its customer for collection does not become the property of the bank, but the bank continues to be the agent of the customer until the collection of the check, which remains in the meantime the property of the depositor. The following quotation from *Morse on Banking* is approved:

> "Where the customer deposits in the bank commercial paper for collection, at the same time indorsing it over to the bank, the parties understanding that it is only intended by the indorsement to put the paper in such shape that the bank can collect upon it, the title in the paper does not thereby pass to the bank, nor does the bank owe the amount to the customer

until such time as the collection is actually consummated. Neither is this strict right of the bank curtailed or altered simply because a practice has been allowed to prevail by which it has allowed the depositor to draw against deposits of paper for collection before the collection has been actually made. This is a mere gratuitous privilege, allowed by the bank, which does not grow into a binding legal usage. Thus, it is very common for depositors to deposit checks with their banks, and to draw against them on the same day checks of their own, which may be presented for payment before the bank has had an opportunity to collect upon the deposited checks. In such cases banks are frequently wont to honor such checks of their customers upon the confidence that the deposited checks will be duly paid. But this habit of the banks is a pure favor, and if there be no distinct understanding to change the natural effect of such dealing, its long continuance gives no real right whatsoever to the depositor to demand its continuance or its practice in any individual case wherein the bank may, for an arbitrary reason, see fit to withhold that favor. Scott v. Ocean Bank, 23 N. Y. 289. In England, a decision given by Lord Ellenborough (9 East. 21) went much further even than this. Bills, not yet due, were sent to a country banker to collect. According to the custom of country bankers these were actually entered in the banker's own books to the depositor's credit, with the proper discount, and he was thereafter entitled to draw against this credit before the actual collection. Upon the subsequent failure of the banker, before the collection, it was held that the title in the bills had not passed to him, and that the depositor should recover them specifically, or their amount, if the bankrupt's assignee had already made the collection" (pp. 683-684).

In other words, this case holds that even if the Port Arthur branch had upon receipt of these documents placed the amount of the draft to the credit of the Seattle bank, that nevertheless the title in the documents would not have passed to the Port Arthur branch and in the event of its bankruptcy they could have been recovered specifically by the Seattle bank.

The principle that a mere collecting bank is not invested with title is nowhere more clearly recognized or established than in those cases in which the goods consigned have been attached by legal process while in the possession of or under the control of the correspondent bank. The reports are filled with such cases, and we shall content ourselves by a citation of the latest of them:

Elm City Lumber Co. v. Childerhose, 83 S. E. (N. C.) 22;

Barton Seed Co. v. Mercantile Bank, 160 S. W. (Tenn.) 848;

Ladd & Tilton Bank v. Commercial State Bank, 130 Pac. (Ore.) 975;

Commercial Bank v. First Nat. Bank, 153 S. W. (Tex.) 1175;

American Thresherman v. Motor Co., 141 N. W. (Wis.) 210;

Pacific Brokerage Co. v. Rushfeldt, 171 S. W. (Mo.) 976.

In all these cases it is held that irrespective of the endorsement of the bill of lading to it, the collecting bank only has a property in the consigned

goods to the extent of any amounts actually advanced and paid over by it to the drawer of the draft. The presence of a title in the correspondent bank to which the collecting bank forwards the documents is not even suggested.

The statement in the instruction here complained of, to the effect that the bill of lading was "the title, the same as a deed to a piece of property, a bill of sale, it amounted to a conveyance of the title to the holder of the bill of lading endorsed in blank," ignores the distinction between the legal and equitable owner. With the bill of lading and, indeed as a part of it, was sent a bill of sale from Centennial Mill Company to Clarkson and Company. In his work on Sales, Professor Williston states, at page 461:

> "But it may be supposed that the seller instead of consigning the goods directly to the buyer, either by negotiable or nonnegotiable bill, consigns them to himself or to a third person with a view to retain title until the buyer pays the price and has not indorsed the bill prior to the loss. The situation on principle seems analogous to that where a conditional sale is made. The seller either retains the property himself or transfers it to a third person for the purpose of securing payment of the price, but the beneficial interest in the goods vests in the buyer on shipment, assuming always that the goods were properly shipped in conformity with the buyer's order. Where the bill of lading names a third person as consignee, who advances the price on the security of the bill of lading, it is evident that the risk must be with the buyer and not with

> the holder of the legal title. The consignee has the legal title of the goods, but he has no interest in the shipment other than to secure repayment of the money which he has advanced. He is usually a banker and the transaction is merely one form of making a loan on security."

In *Barton Seed Co. v. Mercantile Nat. Bank, supra,* we find the same principle stated as follows:

> "* * * The bill of lading was merely a security for the draft, only to be delivered to the consignee on payment of the draft. This is true whether the bill of lading be made out to the consignee directly, or to the shipper's order."

In *Wisconsin &c. Bank v. Bank of British North America,* 21 Upper Canada Queen's Bench Reports 284, a firm called Thomas Clarkson & Co. in Milwaukee drew a draft upon Clarkson, Hunter & Co. in Toronto and gave it to the plaintiff bank, together with a bill of lading, for ten thousand bushels of wheat; and these documents being endorsed by the plaintiff bank were sent to the defendant bank in Toronto to hold them as security for the due payment of the bill of exchange. The bill of exchange was presented and accepted in due course, but not paid. The bill of lading was delivered by the Toronto bank to Clarkson, Hunter & Co. upon acceptance of the draft. The question involved was as to the right of the collecting bank to deliver the bill of lading when the draft was accepted, and prior to payment. It was held, in the absence of specific instructions, that the collecting bank was justified in so doing, establishing the rule subse-

quently announced by this court in *National Bank v. Merchants Bank*, 91 U. S. 92. A question was involved as to the duty of the bank to ascertain the identity between the Milwaukee and Toronto firms of Clarkson, Hunter & Co. The court held that there was no such obligation on the part of the collecting bank. It was said:

> "Here the wheat got into the possession of the consignees with the privity of the plaintiffs, and not because of the delivery to them of the bill of lading by the defendants, which is complained of. By accepting the bill drawn upon them they entitled themselves to the bill of lading which accompanied it, and which, without special instructions to the contrary, the defendants were left to assume had been sent to them *for no other purpose than to enable the consignees to see that they were to be vested with full control over the property if they accepted the bill.*
>
> "If anything else had been intended the plaintiffs would hardly have selected a bank as their agent, for they could not expect of them that they would undertake that kind of agency which would require them either to take the 10,000 bushels of wheat into their possession, and retain it during the forty-five days, or that they should keep a constant watch upon the conduct and circumstances of the assignees, in order that they might step in with the bill of lading (if they retained it), and exercise the rights of the consignors as soon as they suspected insolvency" (p. 293).

It may here be said parenthetically that if any such burden as was imposed upon the Port Arthur branch by the court's instructions was intended by the Seattle bank, it would hardly have selected a

bank as its agent, because it would have compelled the Port Arthur branch to advance the freight on the cargo, amounting to several thousands of dollars, store and insure it at its expense, and then stand guard over it as long as it remained in Port Arthur and was not paid for.

In *Dickerson v. Wason*, 47 N. Y. 439, it was said, quoting from the syllabus:

> "The property in business paper received for collection by one engaged in the business of banking and collection, and forwarded by him to his correspondent in the usual course of such business, without any express agreement in reference thereto, does not become vested in the correspondent, although he may have remitted upon general account, in anticipation of collections."

It was further held in this case that if the property in the note is to vest in the correspondent for collection he or it *must become absolutely responsible* to the principal for the amount, and that the obligation to become thus responsible can be established only by a contract to be expressly proven or inferred from an unequivocal course of dealing.

In the present case if the Port Arthur branch became the owner of these documents and the goods represented by the bills of lading, then there must have been an obligation on the part of the Port Arthur branch to pay the Seattle bank the purchase price of the flour. In other words, this transaction must be shifted from one of agency to one of purchase and sale. The instruc-

tions of the trial court imposed upon the Port Arthur branch the same obligations concerning the care of this flour as if the Port Arthur branch had agreed to buy it from the Seattle bank.

Generally, that a collecting bank does not acquire title to documents or the property represented thereby when drafts are sent to it for collection.

> *Tyson v. Western National Bank,* (Maryland) 26 Atl. Rep. 520;
>
> *Midland National Bank v. Brightwell,* (Missouri) 49 S. W. Rep. 994;
>
> *Commercial National Bank v. Armstrong,* 39 Fed. 684.

In discharge of its duties as agent the Port Arthur branch was bound only to exercise reasonable care and diligence;

National Bank v. Merchants Bank, 91 U. S. 92, in which this court said:

> "In the case in hand, the Bank of Commerce, having accepted the agency to collect, was bound only to reasonable care and diligence in the discharge of its assumed duties. Warren v. Suffolk Bank, 10 Cushing 582. In a case of doubt, its best judgment was all the principal had a right to require. If the absence of specific instructions left it uncertain what was to be done, further than to procure acceptances of the drafts and to receive payment when they fell due, it was the fault of the principal. If the consequence was a loss, it would be most unjust to cast the loss on the agent."

Bank of Bay &c. v. Monongahela National Bank, 126 Fed. Rep. 436.

The foregoing authorities, and many others which are therein cited, hold without dissent that the true theory of the relationship between the Seattle and Port Arthur branch was that of principal and agent, and in no sense that of vendor and vendee. Therefore the instruction of the trial court to the effect that (p. 170):

> "* * * the legal title to the draft and the documents and to the flour in question passed to and became vested in the Russo-Chinese Bank, and I instruct you that as a matter of law, it was in the power of the plaintiff to handle, control, sell and dispose of such flour in any way that was deemed expedient by the plaintiff",

is erroneous; for if the title to the draft and bill of lading was not vested in the Port Arthur branch *a fortiori,* the title to the flour could not have been vested in that bank.

That a collecting bank cannot sell the goods represented by a bill of lading to a third party without notice to the sender, has been expressly held in *Gregg v. Bank of Columbia,* 52 S. E. (S. C.) 195, in which the court said:

> "The Chicago owner of the corn had through the drafts and bills of lading invested the Bank of Columbia with legal authority to offer the corn to Miot—whether as purchaser or as agent of the plaintiff, is not material; but when he refused to take it, the authority of the bank

was at an end, and it had no more right to sell the corn to another than if it had never had the drafts."

This leads to the second suggestion, which was not considered by the trial court in the instructions given and which appears upon its face at least to at once show the erroneous character of the instruction. This is the fact that there accompanied the draft bills of lading, an insurance policy, and an invoice or bill of sale (p. 21) which recited that the Centennial Mill Company had sold to Clarkson & Co. the flour in question at $4.10 per sack. The terms stated were: "Draft 90 days thro Russo-Chinese Bank". When the Port Arthur branch received this document, which as noted was sent it as a part of the transaction, and when furthermore the letter from Seattle transmitting the draft read (p. 32):

> "Seattle, Wash., Dec. 11, 1903.
>
> The Manager Russo-Chinese Bank, Port Arthur, China.
>
> Dear Sir: Enclosed I hand you *for collection* and returns in New York funds 90 d/s drafts as follows:
>
> Clarkson & Co. G. $ 1,100.00
> " " " G. $36,194.80
>
> Documents are to be delivered on payment.
>
> Very truly yours,
>
> R. R. SPENCER."
>
> (Italics ours.)

it is shown that the sole function of the Port Arthur branch was to handle these documents for collection; that they could not sell this flour to anyone other than Clarkson & Co., and that they never had

any title, nor was it intended by the Seattle bank that they should have any title to the *flour*. As a part of this express agency for collection, they were, it is true, vested with the ostensible ownership of the flour by virtue of the possession of the bills of lading, but this was as an agent merely, and not as an owner.

The Port Arthur branch had nothing to do with the selection of the common carrier which transmitted the flour to Port Arthur, and its agents assert that they did not know that Clarkson & Co. were the agents of the steamship line until after the flour had been received in Port Arthur, and then, on account of investigations which they made at the request of Mr. Ostrander. But it is immaterial whether they knew that fact or not. It appears that there was no reason to suppose that Clarkson & Co. were not solvent at the time, and not a reliable house. Clarkson & Co. had for some years been buying flour in large quantities from the Centennial Mill Company and through these banks (p. 100). Mr. Ostrander, the general agent of the Centennial Mill Company testified (p. 100) that he was at Port Arthur late in January and early in February, 1904; that he knew Clarkson & Co. well and knew that they were agents of the steamboat company, and that such was a well-known fact. We ask under what possible theory is it claimed that the Russian bank should in this especial case have been called upon to take all these precautions when it had never done so in the past?

If there could have been any element of suspicion from the fact that Clarkson was also the agent of the steamship company, the Seattle bank cannot complain that they were not notified thereof by the Port Arthur branch, because the Centennial Mill Company at least knew that fact, and did not deem it a circumstance sufficient to comment upon.

The instructions of the trial court placed upon the Port Arthur branch a responsibility which we assert is entirely foreign and beyond that of a bank handling documents for collection. It would render such banking business impossible, because it would thrust upon a collecting bank heavy responsibilities and oblige it to make outlays as to a cargo which might be worthless. In the present case it is apparently claimed that the Port Arthur branch, without any specific request from the Seattle bank and merely by force of its employment, should have at once taken the following steps:

1. To pay the freight of $5.00 per ton, or $4325.72 (p. 22), because the bill of lading stated that the freight, "with all other charges, advanced " charges and average, should be paid immediately " upon the discharge at Port Arthur".

2. To secure other warehouse accommodations (if there were any in Port Arthur) and pay the cost of moving the flour from the warehouse of Clarkson & Co. to this other warehouse.

3. To pay the cost of insurance.

4. Apparently also to place watch over and guard the flour.

This responsibility, however, becomes still more extraordinary when the conditions under which the documents were transmitted are considered, for, as noted, these banks had had similar transactions for some time. Mr. Spencer testified (p. 89) that the letter his bank received from the Port Arthur branch dated January 22, 1904, and acknowledging the receipt of the draft was the usual form in which he had received such acknowledgments. This letter contained the following statement (p. 90):

"PLEASE NOTE.

1. That, unless otherwise instructed, bills of any description sent us for procuring acceptances &/or for collection will be protested both for non-acceptance or non-payment and immediately returned to the sender.

2. When sending us for collection DOCUMENTARY BILLS OR ONLY DOCUMENTS, clearly state in your letter accompanying same whether in case of dishonor:—

(a) both bill and documents are to be promptly returned with the relative deed of protest, or

(b) if the bills are to be returned and the relative documents are to be kept here at your disposal, or

(c) if the goods are to be stored by us and fire insurance is to be covered pending receipt of your instructions.

3. Our bank does not guarantee that the goods be stored in due time when there is no storage accommodation obtainable, and takes no responsibility whatever if same are not landed in perfect condition, nor if the goods are deteriorating or becoming of lower value in con-

sequence of price fluctuations while under our bank's control.

Yours faithfully,

RUSSO-CHINESE BANK,

(Port Arthur Branch)."

It is admitted by Mr. Spencer that he did not give any special instructions (p. 91). By the instructions of the court the Port Arthur branch was held under its common law liability to do these acts concerning which it had asked for express instructions and which the Seattle bank did not take the precaution to give. It was furthermore asked to exercise a greater care over the flour than Mr. Ostrander, the agent of the Centennial Mill Co., thought was necessary (p. 100). We have therefore the unique result, that the court imposes upon a collecting bank a greater degree of care and a heavier responsibility than either the shipper of the flour or the bank from which the draft was received ever had in contemplation.

There is still a third consideration in no wise referred to in the foregoing instructions, and which tends to prove that the Port Arthur branch was not the unqualified owner of the flour, in accordance with the court's instructions. This arises from the fact that the *draft had been accepted by Clarkson & Company.* This essential step in the transaction has been ignored, and the relations of the parties defined as if the draft had *not* been accepted. When the draft was accepted by Clarkson & Co. they became the principal debtor thereof and

the document was to all intents and purposes a promissory note, by which Clarkson agreed absolutely to pay the sum mentioned, ninety days from date. As soon as this acceptance was obtained the Port Arthur branch could not dispose of this flour to anyone other than Clarkson & Co., for the reason that they retained title simply *as security for the payment of the draft.* If there was no obligation on the part of the Port Arthur branch to transfer the bills of lading to Clarkson & Co., then there was no consideration for the payment of the draft; *per contra,* if there was such consideration for the draft, then there must have been a corresponding obligation on the part of the Port Arthur branch.

We refer in this connection to the leading case of *National Bank v. Merchants Bank,* 91 U. S. 92. In this case the bills of lading were delivered upon acceptance of the draft, and it was held that the bank was obliged to deliver them upon such acceptance. The case of course differs from the present one in that there was here an express instruction to deliver against payment, but even in such a case this opinion holds that the property is retained by the bank merely *as security.* That the fact that the draft is one "for collection" indicates an agency, and rebuts the inference that the agent is the owner of the draft. Directly pertinent is the following statement by the court (p. 97):

> "In the absence of special agreement, what is the consideration for acceptance of a time draft drawn against merchandise consigned? Is it the merchandise? or is it the promise of the

consignor to deliver? If the latter, the consignor may be wholly irresponsible. If the bill of lading be to his order, he may, after acceptance of the draft, indorse it to a stranger, and thus wholly withdraw the goods from any possibility of their ever coming to the hands of the acceptor. Is, then, the acceptance a mere purchase of the promise of the drawer? If so, why are the goods forwarded before the time designated for payment? They are as much, after shipment, under the control of the drawer, as they were before. Why incur the expense of storage and of insurance? And if the draft with the goods or with the bill of lading be sent to a bank for collection, as in the case before us, *can it be incumbent upon the bank to take and maintain custody of the property sent during the interval between the acceptance and the time fixed for payment?* (*The shipments in this case were hundreds of bales of cotton.*) Meanwhile, though it be a twelvemonth, and no matter what the fluctuations in the market value of the goods may be, are the goods to be withheld from sale or use? Is the drawee to run the risk of falling prices, with no ability to sell till the draft is due? If the consignment be of perishable articles,—such as peaches, fish, butter, eggs, &c.,—are they to remain in a warehouse until the term of credit shall expire? And who is to pay the warehouse charges? Certainly not the drawees. If they are to be paid by the vendor, or one who has succeeded to the place of the vendor by indorsement of the draft and bill of lading, he fails to obtain the price for which the goods were sold." (Italics ours.)

We have searched the books to find a case in which it has been held that a collecting bank has in the absence of special instructions any such degree of responsibility concerning goods which are evidenced

by a bill of lading that passes through its hands. No such case has been brought to our attention, nor can we find that any such claim has been made. This silence on the subject is strong evidence that it is not founded upon any legal right. As was said in *Le Caux v. Eden,* 2 Doug. 594, cited in *Bancroft v. Bancroft,* 110 Cal. 374, concerning another person:

> " 'There is no case in which it has ever been holden that such an action would lie; and if it could be maintained, there are, in every way, such frequent opportunities for it that it must have happened in every day's practice, or some instances at least must have been in the memory of those who have had long experience in "Westminster Hall"; but there is not the smallest trace of such a determination, or even dictum, in any court in England. A universal silence in Westminster Hall on a subject which so frequently gives occasion for litigation is a strong argument to prove that no such action can be sustained.' That case was decided in 1781, and dealt with litigation which could arise only out of the exceptional condition of war. How much stronger, therefore, is the authority of more than another hundred years of 'silence' in the courts of both England and America, upon a subject which, both in peace and war, 'so frequently gives occasion for litigation'." (pp. 378-379.)

Nor can it be said that this instruction of the trial court, to the effect that the collecting bank became invested with the title and ownership of the flour as to all the world except the National Bank of Commerce, is a theoretical error merely; this for the reason that it is the foundation upon which

was built up the specific postulate with which this instruction concluded, viz.:

> "As the agent for the owner it was obligated to account for the amount of the draft, to account for the security which the bill of lading constituted, *and it cannot be excused from obligation to account by saying that the flour disappeared without its knowledge* and require the defendant in this case in order to fasten an obligation upon it to prove that it was negligent."

The refusal of the trial court to instruct that the collecting bank's duty was with the documents (Trans. p. 161, Specification of Error 4), and its measure of responsibility only a "reasonable" one (Trans. pp. 160-162, Specification of Error 6) further illustrates the importance of this theory of "ownership".

Thus there was completely withdrawn from the consideration of the jury the question as to whether or not the collecting bank was in fact negligent. This negligence was presumed as a matter of law. If the flour had been destroyed by the Japanese invading forces, or other external cause, and such facts were admitted, still the collecting bank would have been liable because the question of its negligence or absence of negligence was not to be considered at all. It must either pay the draft or produce the flour. In other words, it was the real *purchaser of the flour*, and therefore regardless of any happening obliged to pay the purchase price.

3. *The Ginsburg Transaction. (Specification of Error 9).* The court should, by requested instruction XI (Trans. p. 163), have brought before the jury the law concerning the payment to the Port Arthur branch of the 67,000 roubles obtained from Ginsburg and Company. The evidence shows that this payment was made to the bank for the specific purpose, in part, of taking up two drafts also drawn by the Centennial Mill Company, and the proceeds of which were remitted to the respondent in Seattle. It was, however, claimed by the respondent in this case that the bank should have devoted these 67,000 roubles to the payment of the draft in question. The requested instruction was to cover the point that the bank, in accepting the 67,000 roubles, was controlled by the instructions given it by Clarkson & Company who made the payment, and that the bank did not have any right to apply this money to any other drafts. Further, that even if the 67,000 roubles had been applied on the draft of December 10th, it would not have been sufficient to pay it in full, and the bank would have had no right to deliver the bills of lading until such payment in full The court did not give any instruction concerning this Ginsburg transaction. Obviously, it should have been eliminated entirely from the case, because, it was not concerned with the cargo from the "Hyades", but since the evidence was admitted, the instruction requested should have been given.

4. *The court erred in permitting evidence of a so-called custom concerning the duties of a collecting bank.* This applies particularly to the testimony of the witness R. R. Spencer, referred to and set forth in Specifications of Error 11, 12, 13, 14, 15, 16 and 18, and to the testimony of the witness W. S. Davidson referred to and set forth in Specifications of Error 19 and 20. Similar error occurs in the refusal of the requested instructions that no custom or usage could impose upon the petitioner obligations in addition to those contained in the letter of instructions. (Specification of Error 7.)

The witness Spencer upon cross-examination (pp. 92 et seq.) was asked many questions concerning the commercial usage among banks. Objections were made to these questions, which were overruled. The witness stated in answer that the collecting bank was expected to use diligence in taking such steps in regard to storage, insurance and so forth as they would take were the property their own. The theory upon which this evidence was permitted was stated by the witness himself as follows (pp. 94-95, Specification of Error 17):

> "As I take it then, Mr. Spencer, these requirements or these suggestions (those contained in the letter referred to) that the Russo-Chinese Bank made to you as to what you should tell them when you sent the draft, what to do with it in case of dishonor, as I understand you the commercial usage would

control that regardless of whether you told them to do so or not?

A. Yes, sir."

That is, it was claimed by the witness, and the court allowed the testimony, to the effect that the custom would control *even if the Seattle bank had directed the Port Arthur bank specifically in regard to the subject.* The custom would thus override any specific agreement made between the parties.

We submit that this evidence is inadmissible upon several grounds: It was in the first place not cross-examination, and this objection was made (p. 97); because the witness, upon his direct examination had been asked (pp. 89-92) only concerning the facts of this specific case.

In the second place, usage or custom it is submitted cannot be invoked in contradiction of an express contract.

> "While a custom may be resorted to to explain a doubtful or ambiguous contract, it will not be admitted to vary or contradict the terms of an express contract. No usage can change the plain meaning of a contract."
>
> *Smith v. National Bank of D. O. Mills*, 191 Fed. 226;
>
> *Morse on Banking*, Sec. 223.

> "A custom or usage regulating dealings between certain merchants and their customers, contrary to or different from the law of the land, cannot be allowed * * * a bill of lading having a definite legal meaning, the liability of the carrier fixed by law cannot be changed

> by the custom of a particular place among a certain class of shippers. * * * Usage cannot make a contract where there is none, nor prevent the effect of the settled rule of law."
>
> *Charles v. Carter,* 36 S. W. Rep. 396.

The evidence concerning this alleged custom would have made a new contract for the parties. It would have compelled the Russo-Chinese Bank to store the goods in an independent warehouse, which in itself would have been a proceeding that we assert the bank in the absence of instructions had no right whatever to do. If it had so acted it is our claim that it would have interfered without right in the relations between the Seattle bank and Clarkson & Co. It would have compelled the Port Arthur branch to have incurred a large liability for freight, cartage, warehousing, etc., and to have charged this liability against the goods. This in effect is an entirely new contract, because the Seattle bank may not have been willing that this expense should be incurred.

In the third place, this evidence was not admissible because the witness did not testify concerning the custom at Port Arthur, a place that he had never visited (p. 98). The witness was not asked, nor did he answer, concerning his knowledge of any commercial custom in Port Arthur, but said simply "that it is commercial usage". A usage or custom, to be of any effect, must be shown to have prevailed at the place to which the goods were sent, and not from which they came. As was said in *Wisconsin*

&c. Bank v. Bank of British North America, 21 Upper Canada, Queen's Bench Reports:

> "Evidence of commercial usage is alone material which deals with the usage at the place where the duty is to be discharged."

To similar effect is *Elm City Lumber Co. v. Childerhose, supra,* at page 25.

In this case evidence of the commercial usage at Milwaukee, from which the documents were sent, was held inadmissible to control the actions of the parties in Toronto, where the documents were received.

Questions were asked the witness W. S. Davidson concerning the customs and methods of bankers in the Orient. These questions will be found on pages 132-140 and are assigned as error (pp. 184-187). The first question (p. 132) was:

> "What is the custom of bankers with reference to presenting drafts for acceptance?"

To which an objection was made on the ground that there was here no reason to invoke any custom or usage. This objection being overruled, the witness answered that it was customary to request the drawee to accept it.

The next question was (p. 132):

> "What is the established custom among bankers at Oriental ports with reference to the handling of drafts with bills of lading and documents attached, when the drafts are in their hands for collection?"

To this question the previous objection was made, namely, that there was no reason to invoke a custom or usage, and secondly, because the conditions are not stated in the question, that is it was not stated whether the documents referred to were sent as against payment or as against acceptance. This objection being overruled the witness answered:

> "The established custom among bankers in the Orient is not to part with the documents until the drafts have been paid, if the documents are only deliverable against payment. It often happens, however, that the firm upon which the draft is drawn has a good credit with the bank and under those circumstances the bank delivers the documents against acceptance and thereby accepts responsibility" (p. 133).

We realize that we have dwelt at considerable length upon objectionable testimony as to the custom and usage of a collecting bank. We regret if we have thereby unduly prolonged this brief; but we have been impressed with the importance of a full consideration of the error presented by the admission of this objectionable testimony. The whole theory of the only defense seriously urged by respondent was based upon it.

5. *Certain of the testimony of the witness W. S. Davidson and of the witness Arthur T. Short was prejudicial to petitioner and requires comment at this point. (Specifications of Error 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33 and 34.)*

The witness Davidson was asked the question (p. 133):

> "What is the custom of the Russo-Chinese Bank upon the arrival of shipments were drafts with bills of lading are attached are in their hands for collection?"

(The word "were" is evidently a misprint for "where".)

To this question again the objection was made as heretofore, and we request the court to read the precise language of this objection and the remarks of the trial court thereon (pp. 133-134). The objection being overruled the witness answered:

> "The custom of the Russo-Chinese Bank at Port Arthur was to see that the cargo was stored and insured and the managers of the Russo-Chinese Bank have frequently come to the office of Clarkson & Company to ascertain if certain cargo was properly stored and have taken out fire insurance with some of the fire insurance companies for which Clarkson & Company acted as agents, on such cargo." (p. 134.)

The plaintiff then requested that portion of the answer which began with the words "and the managers", etc., down to the end of the sentence, be stricken out as not responsive and as being no evidence of a custom, and this motion to strike out was denied. This ruling also was excepted to.

It is submitted that these objections should have been sustained. Manifestly the jury could not know whether the custom referred to was pertinent, unless it was stated to be under like circumstances to those given in the pending case. Whether or not

the Russo-Chinese Bank looked after the storing and insurance of the cargo would of course depend upon their special instructions. The witness did not claim to know whether any such instructions were given. Until the facts connected therewith were made clear, it is manifest that no evidence of any custom could be pertinent, because it cannot be denied that if the Seattle bank had specifically requested the Russo-Chinese Bank to store and insure the cargo and this commission had been accepted then that such duty devolved upon the Port Arthur branch.

The witness having been allowed to state that the custom of the Russo-Chinese Bank was to store and insure the cargo, he was asked the question (p. 134) if in transactions between Clarkson & Co. and the Port Arthur branch this custom was strictly observed. To this last question an objection was made upon the ground that the custom as between the two firms was not pleaded, and further, that the course of business referred to in the question must be diametrically opposed to the previous answer of the witness, when he stated what the custom between the firms had been.

It can require no citation of authority to show that a party that relies upon a custom or usage must plead it. The only pleading on that subject in the amended answer is that set out on page 13, to the effect that it was the duty of the plaintiff under the custom of bankers to look after, protect and care for the flour represented by the bill of lading,

and to warehouse and insure the same. The question which we are now discussing did not refer to this custom so pleaded, but to a course of business *which was opposed to this custom.* There is no pleading to the effect that the custom or course of business between the firms permitted Clarkson & Co. to have the bills of lading before the draft was paid. Indeed, this testimony seems a good instance of the danger of testimony of this character, which is after all but opinion testimony, for this witness having stated what the custom was between the two banks, *then proceeds to state that this custom was not observed.* Then it ceased to be the custom.

We have also assigned as error (p. 187) the overruling of the objections of petitioner to all the questions asked the witness Davidson concerning the custom and practice and course of dealing between the Russo-Chinese Bank and Clarkson & Co. We submit without a more clear statement of the character of the instructions given by the forwarding bank in each case it was impossible to invoke any custom or usage.

We urge also that the court committed error in denying plaintiff's motion to strike out a portion of the answer of the witness Davidson to Direct Interrogatory 33 (p. 138), the latter portion of the question being:

> "State whether or not the Russo-Chinese Bank consented to the sale of the flour on the Hyades by Clarkson & Company prior to the payment of drafts?"

The witness answered (p. 138):

> "On or about the 15th day of February, 1904, the Russo-Chinese Bank did consent to the sale of the flour ex steamship 'Hyades,' if that is the name of the steamer that arrived at Port Arthur on or about the 8th of February, 1904."

Plaintiff's motion was based upon the fact that it had already been stipulated in the case that the vessel which reached Port Arthur on or about February 8, 1904, was not the Hyades, but the Pleiades. This stipulation appears on page 89, to the effect that the Hyades reached Port Arthur on January 16th and left on January 22nd; that the Pleiades reached Port Arthur on February 7th and left Port Arthur on February 13th.

Obviously therefore the testimony of the witness to the effect that the Russo-Chinese Bank did consent to the sale of the flour had no reference to the cargo in question, because he was speaking about the *Pleiades* and *not* the Hyades. It is furthermore evident that all of the answers of this witness concerning the action of the Port Arthur branch in releasing flour referred to the cargo of the Pleiades, which he personally sold to Ginsburg & Co. (pp. 138-39). The evidence was demonstrably irrelevant as not referring to the cargo securing the draft.

We urge also that the court erred in refusing to strike out a portion of the answer of this witness Davidson to Direct Interrogatory 56 (p. 145). The question was:

"Do you know whether this draft drawn by the Centennial Mill Company and in the hands of the branch of the Russo-Chinese Bank at Port Arthur covering this shipment of flour was ever actually paid?"

To which the witness answered:

"No; I have no knowledge, definite knowledge, that it ever was paid since I left Port Arthur long before it fell due. But if it was not paid by Ginsburg & Company then it was the fault of the Russo-Chinese Bank because the firm of Ginsburg & Company to my definite knowledge have ever since been able to pay this draft and if for any reason the arrangement I made with Ginsburg & Company was avoided or not carried out then the Russo-Chinese Bank had it within their right and power to demand the surrender of the keys to the warehouse from Ginsburg & Company."

The portion of this answer beginning with the words "But if it was not paid" is obviously not responsive to the question and was most detrimental to the plaintiff, because the witness pretended to be then speaking about the draft in question, stating that Ginsburg & Co. have ever since been able to pay it. The motion to strike out was precise on this point (p. 145). The facts are that Ginsburg & Company had nothing to do whatever with this draft, but were concerned with another cargo, and when the witness stated that he had no definite knowledge that this particular draft had been paid the rest of his answer should have been eliminated.

The witness Short was asked the following question (p. 106):

> "Now, in all your dealing with the Russo-Chinese Bank in handling other shipments of the Centennial Mill Company, I will ask you what arrangement if any was made with the bank in regard to the handling of this flour?"

This witness was the only witness produced by the defendant who claimed to have had any part in the special transaction with which the court is concerned. He testifies that he was the one who accepted the draft for Clarkson & Co. and made the arrangement with the Russo-Chinese Bank. We submit that it is quite immaterial as to what his dealings had been with the bank in reference to other shipments.

We urge that the court erred in refusing to strike out as not responsive a portion of the answer of the witness Short (p. 108) to the following question:

> "Who told them?"
> "A. I would tell them or Davidson would tell them. The object of getting a 90 days sight draft was that we could get delivery of the flour without payment, and that we paid in the money as soon as we got it. As soon as the flour was sold the money was collected in."

The answer, beginning with the words "The object" to its conclusion can have no reference to the question "Who told them?" The objectionable matter was highly detrimental to plaintiff. The motion was upon the ground that it was not responsive to the question—and should have been granted.

IV.

THE RESPONDENT HAS NOT BEEN DAMAGED BY ANY ACTS OF NEGLIGENCE ON THE PART OF PETITIONER. HEREIN IS DISCUSSED THE EFFECT OF THE PAYMENT BY CENTENNIAL MILL COMPANY TO RESPONDENT.

Spencer, manager of the defendant bank, testifies (p. 91) that his bank had a guaranty from the Centennial Mill Company to protect them against the draft and that, independent of this guaranty, he had a verbal understanding with the president of the Centennial Mill Company that if they continued to send drafts to the Russo-Chinese Bank it must be done at the request of the Centennial Mill Company and that this company must stand for all liabilities and risks that were incurred by so doing. This arrangement was made before the shipment on the Hyades. The witness further testified as follows (p. 91):

> "The Mill Company subsequently paid the money back to us, November 2, 1904. That was before the Russo-Chinese Bank had paid us."

It therefore appears that at the time this action was brought the respondent bank had suffered no loss from the transaction, nor has it suffered any such loss since. Petitioner's negligence, even if assumed, has resulted in no damage to respondent. Under no circumstances can the Centennial Mill Company recover the money paid by it to the Seattle bank, because the Mill Company had itself assumed all risk and if the defendant is obliged to pay a judgment in this case it can recover it back from

the Mill Company. The latter company is therefore the real party in interest.

It follows that the respondent has no valid claim for damages against your petitioner, and having no such claim, it cannot interpose it to defeat petitioner's claim. It is immaterial in the present case that the Mill Company may have such a claim for damages. Such claim if valid may still be enforced by the Mill Company against the plaintiff, and to permit this claim for damages to release the bank from the payment of the sum in suit, and also to allow the Mill Company to recover thereon from the plaintiff, would be to permit a double recovery for the same cause of action.

Before this claim for negligence can avail respondent it must have acquired it by assignment or otherwise from the Mill Company. It cannot vest both in the Mill Company and respondent.

The situation seems the same as if the Seattle bank having, we will say, a valid claim for damages on account of negligent acts against the Port Arthur branch, had assigned this claim to some independent third party. When sued by the Port Arthur branch the defendant bank could no longer rely upon this claim for damages, because it no longer owned it. The legal owner of the claim is the only one that could have interposed this defense.

The respondent at the time the suit was commenced was not the holder of any claim for damages against your petitioner, and it therefore cannot

now assert this claim as a defense to the present action.

V.

HEREIN IS DISCUSSED THE FAILURE OF PETITIONER TO CALL AS A WITNESS OVSIANKIN AND TO PRODUCE THE WRITTEN AGREEMENT OF GUARANTY.

It is recognized that this court will not upon this proceeding be primarily concerned with questions of fact. Since the Court of Appeals, however, in its opinion rested its conclusion upon the ground that there was at least some evidence to support the special verdict and therefore that all other questions in the case became immaterial, and particularly regarded "as a most significant circumstance" that the manager of the Port Arthur branch, Ovsiankin, was not called to contradict the testimony of Short and Davidson, and that the written agreement of guaranty was not produced or accounted for, we deem it necessary to briefly refer to this phase of the case.

The claim that the collecting bank had violated its instruction by taking this so-called letter of guaranty was not mentioned in this case until the witness Short was called. It is not referred to in the pleadings. Practically all the testimony in behalf of the petitioner, plaintiff below, was produced through the medium of depositions taken in Russia. In none of these depositions was there any intimation from the defendant below that it claimed any such defense.

The witness Friedberg, one of the managers of the Port Arthur branch, had testified (Transcript, page 24), denying positively that the Port Arthur branch had ever received possession of the flour or sold it to any one.

Upon the testimony of Short alone is there any support whatever for this arrangement under the letter of guaranty. His testimony in brief is that when he accepted the draft in behalf of Clarkson & Co., Ovsiankin, then manager at the bank, *verbally* told him, Short, that he might take the flour and sell it under the letter of guaranty, and that the letter of guaranty was furnished. It was said that this arrangement was made in a most informal and hurried manner, there being at the time a crowd of people in the bank (122). Short was unable (Trans. pp. 114-115) to state the language of the letter of guaranty in general terms. He said (p. 115):

"Q. And what did the bank give you?
A. What did the bank give us?
Q. Yes.
A. Permission to take the cargo.
Q. Did it give you any writing?
A. No.
Q. No writing at all.
A. No writing.
Q. Didn't they deliver you the documents sometimes?
A. Sometimes they did. If we asked for them we would get them.
Q. Didn't you always ask for the documents?
A. No.
* * *"

(p. 116)

"Q. So that the only thing that was done was that you would sign this letter?

A. Yes.

Q. And then you would have a sort of an oral talk with the manager?

A. Yes."

In another portion of his testimony this witness said (p. 121) that he knew that Clarkson & Co. as importers had no right to deliver the goods without the production of the bills of lading and that he did not ask for the bills of lading in this case.

The failure to call the witness Ovsiankin to refute this testimony was, of course, petitioner's misfortune; but inasmuch as it had in its case in chief shown that it claimed never to have had anything to do with the flour, and as Ovsiankin was in Vladivostok at the time of the trial, we think that no significance should be attached to the failure to call him, or to secure his deposition, because the plaintiff below had no reason to suppose up to the time that Short's testimony was given that he, Ovsiankin, more than any other employe of the bank would be the one with whom this arrangement would be claimed to have been made. Nor can any inference of concealed information be attributed to the petitioner because it did not produce this letter of guaranty for the obvious reason that it has denied that it ever obtained possession of the shipment of flour and does (Friedberg, p. 24) not admit it ever received any such letter.

The deposition of Davidson did not intimate that any such defense would be claimed. To the contrary, the testimony of this witness is directly opposed to that of Short, for he testified, and this statement is many times repeated, that the bills of lading were always delivered by the bank when the letter of guaranty was given, and that Clarkson was never permitted to sell the flour until after the bills of lading had been delivered (Trans. pp. 142 and 156). Since the petitioner had in its possession the bills of lading and produced them at the trial, it had substantial reason to suppose that the custom testified to by Davidson had not been carried out in this case, and that the collecting bank had not given permission to Clarkson & Co. to take this particular cargo.

VI.

CONCLUSION.

The money here sued for was paid the respondent by the petitioner when both parties were ignorant of the facts as they existed at Port Arthur. The respondent received the money under a distinct promise that it would repay if it subsequently developed that the draft had not in fact been paid. At the conclusion of the war, the petitioner submitted to the respondent evidence of non-payment which seems conclusive if one is to reach conclusions as determined by the common experience of men in such affairs. The fact that the draft was not given

Clarkson & Co., but was protested for non-payment and re-mailed to Seattle, that the books of the Port Arthur branch show no acknowledgment of the receipt of any money on account of this draft, that the employees of the Port Arthur branch having the matter particularly in charge testified positively that the draft was not paid in whole or in part;—any one of these circumstances would in ordinary affairs be adjudged quite sufficient, and when they are combined seem irrefutable. As against this showing, respondent has produced no direct proof of payment. There is not a document nor a word of testimony that the collecting bank ever received a dollar on this draft. The trial court permitted proof of inferences and presumptions of payment as shown by transactions that had previously occurred under radically different conditions, but there is no evidence of any facts from which any inference or presumption may be deduced that the respondent bank had in fact received any money for this draft. If it was paid, then the Seattle bank would have had a cause of action against the Port Arthur branch for money had and received. There can be no claim that there was any evidence produced in this case which would have made a sufficient showing to have enabled the Seattle bank to recover in such action on assumpsit. Herein lies the importance and materiality of the instructions given as the only support for this verdict of payment. If, as we respectfully submit, they are fundamentally erroneous, then they are necessarily prejudicial.

The facts in this case are singularly free from dispute. They show that without any special instructions, and for a nominal consideration, a collecting bank undertook to handle certain documents. No mention was made of any duty concerning the goods evidenced by the bills of lading. The only instruction concerned the documents. The petitioning bank in the highest good faith, and relying upon the assertion of the respondent bank that the Port Arthur branch had in fact received the money for this draft, paid it upon the single condition that if the documents were returned showing that the draft had not been paid, then that the money would be repaid. The collecting bank subsequently was able to show that it had cared for these documents with the most scrupulous fidelity. Notwithstanding the extreme conditions prevailing at Port Arthur incident to the war, the bank was kept open by its officials and its business attended to as far as possible. Although it was claimed in the answer that the collecting bank had been negligent in failing to present the draft for acceptance within time and to protest it for non-payment, no evidence was produced to substantiate those allegations, and the trial court instructed the jury that there was no evidence to sustain them (Trans. pp. 168-169). Here it would seem that at least the *prima facie* obligation of the petitioner ceased. It had performed what it was requested to do. But by reason of the instructions of the trial court, specified as error, a new and much more onerous obligation has been injected into the

obligation of any bank that receives a draft for collection. It must not only look after and preserve the documents, but it has the same obligations as concerns the goods. Thus this case is one of extreme importance to all banks engaged in the business of handling drafts and documents for collection. If they are obliged in every case to look after the goods, pay the freight, insure them, etc., it is manifest that such obligation should be at once made known.

Through the result of this litigation as thus far concluded, there has been forced upon the collecting bank the obligation of actually paying for this large consignment of flour, notwithstanding that it had no personal interest therein and has never been paid even its collecting charges. The flour was sent to the Orient at a time when the consignor and the Seattle bank fully realized that war between Russia and Japan was imminent, and that Port Arthur would probably be the scene of the opening hostilities of that war. Yet by the anomalous results of this case the sole risk of such enterprise has been imposed upon a third party and profit realized by those who voluntarily embarked upon the enterprise.

We seek the final and authoritative decision of this court in order that all banks acting as such collecting agents may be informed of their obligations and duties so that they may take such precautions as may be necessary to guard against any

such unusual responsibility as has been visited upon the collecting bank in this case.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 244.

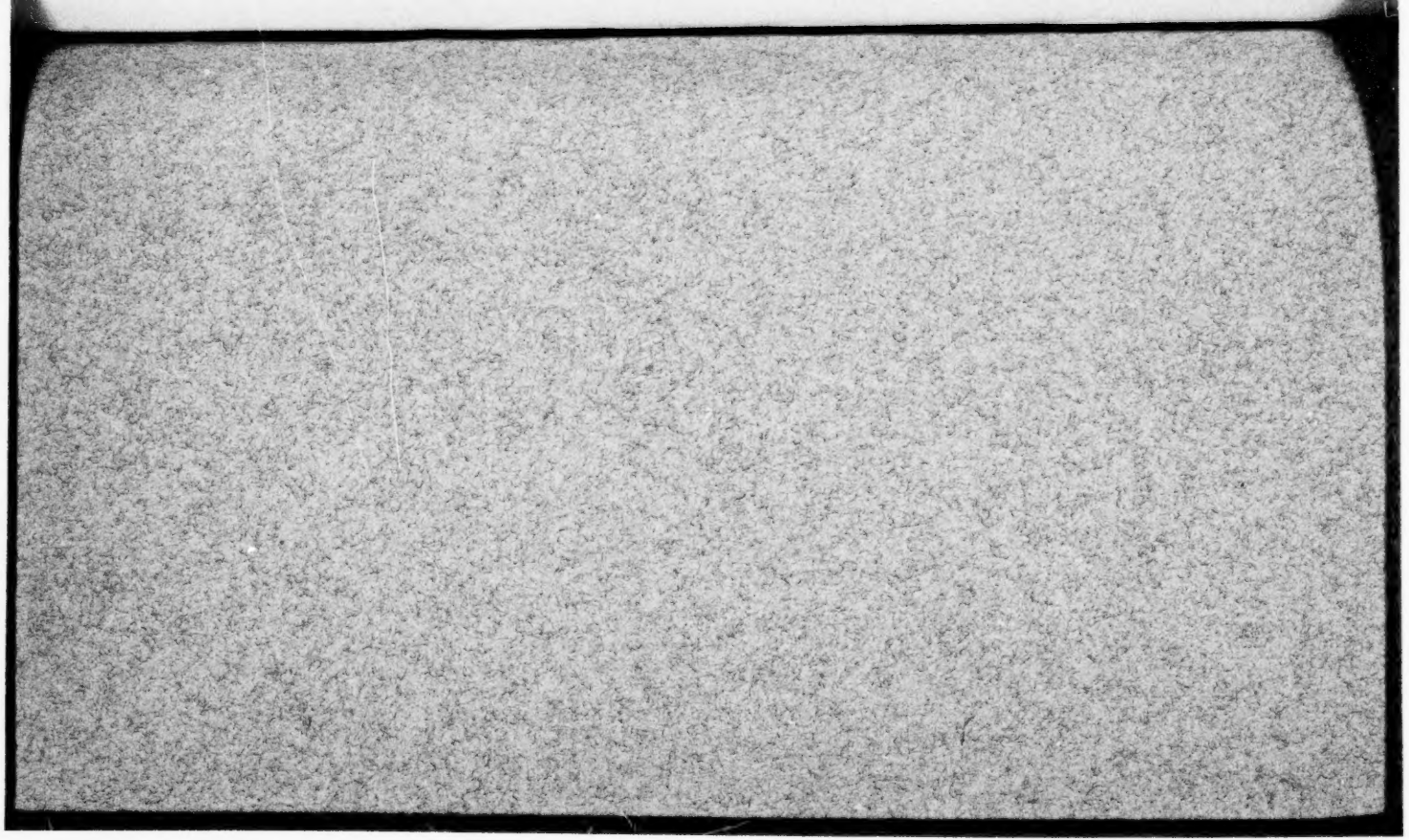
RUSSO-CHINESE BANK, PETITIONER,

vs.

NATIONAL BANK OF COMMERCE OF SEATTLE,
RESPONDENT.

REPLY BRIEF FOR PETITIONER.

WARREN GREGORY,
GEORGE H. WHIPPLE,
Counsel for Petitioner.



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RESPONDENT.

REPLY BRIEF FOR PETITIONER.

In its opening brief petitioner urged that certain instructions of the trial court compelled the special verdict, eliminated any consideration by the jury of negligence or a failure to obey instructions by the Port Arthur branch or of the damages resulting therefrom, and that therefore any minute analysis of the testimony was unnecessary; that if permission to take the cargo of flour, as Short testified, constituted in law a payment of the draft, no other feature of the case need be considered.

Respondent has, however, in its brief, not seen fit to rely wholly upon the validity of these instructions, but to the contrary and at considerable length has endeavored to per-

suade the court that there was at least *some* evidence of payment of the draft by which the special verdict may be upheld.

It seems, therefore, proper that we now refer more at length to the evidence by which it is claimed this payment was proven.

Attention is first drawn to the unusual significance given by the trial court and by opposing counsel to the word "payment." In the case of a bank draft, we take it that the word in its ordinary significance means "satisfaction in money or legal tender." But in the record the word is made to include not only satisfaction in money, but also a cross-claim for damages on account of alleged negligence. While objection was made by petitioner to all of this line of evidence, on the ground that it could not tend to prove a payment of the draft, as such expression must have been used by the parties when the promise was made to repay the money if the draft had not been paid, we shall, nevertheless, now attempt to briefly summarize all of the evidence bearing either upon a direct or indirect payment of the draft.

1.

Direct Proof That Any Money Was Ever Received by the Port Arthur Branch on Account of This Draft.

(*a*) On the part of the petitioner it was testified that the bank had never received any payment of the draft, either in whole or in part. This testimony is referred to on page 10 of petitioner's opening brief, and will not now be repeated.

(*b*) On the part of the respondent there is no evidence that any one ever sent to the bank or that the bank ever received, either in currency, specie, or by draft or check, any funds to pay for this flour, or to discharge this draft in whole or in part. Both Short and Davidson, the only witnesses for respondent, left Port Arthur early in February, having previously severed their relations with Clarkson & Co. This

was nearly three months before the Hyades draft became due. Short testified (p. 114):

> "Q. Do you know or have you any personal knowledge concerning the payment of this draft of the 'Hyades' flour?
> "A. I don't just catch your question.
> "(Question read.)
> "A. No.
> "Q. You were not in the employ of Clarkson & Company at that time?
> "A. No.
> "Q. And that draft became due about the 30th of April, 1904, didn't it?
> "A. No, I was not.
> "Q. So you know then——
> "A. (Interrupting.) Know nothing whatever of the payment."

And that Short knew nothing of the disposition of the Hyades flour is shown by his testimony (p. 119), printed on page 13 of petitioner's opening brief.

Davidson testified (p. 145):

> "Q. Do you know whether this draft drawn by the Centennial Mill Company and in the hands of the branch of the Russo-Chinese Bank at Port Arthur covering this shipment of flour was ever actually paid?
> "A. No; I have no knowledge, definite knowledge, that it ever was paid since I left Port Arthur long before it fell due."

On page 149 this witness testified that he had no recollection of ever having seen this draft.

2.

Indirect or Inferential Proof That Such Payment Was Made.

(*a*) It is first claimed that a telegram of May 19, 1904, sent to the Vladivostok branch (p. 67), which stated that all drafts of the Centennial Mill Company to date were paid, is evidence of payment.

But the uncontradicted showing is that this telegram was sent by the Vladivostok branch on advices received from Clarkson (p. 84), and at a time when Vladivostok had no means of communicating with Port Arthur; that as soon as the head office at St. Petersburg ascertained the fact of this mistake they wrote the Seattle bank (p. 68) as follows:

> "We have received your two favors of the 12th and 17th October and, after perusal of contents, we beg to inform you that the information given by our Vladivostok branch to Messrs. Clarkson & Co., Shanghai, is due to a gross error of our branch, as the same transmitted that information, on the simple demand of the interested party, Clarkson & Co., without having any proof of the payment of your remittance to Port Arthur."

With this same letter there was transmitted to the Seattle bank a check for the money in controversy.

This letter was written more than a year before the St. Petersburg bank had recovered its books or knew definitely anything about the payment of the draft. There is no claim that the respondent bank suffered any prejudice by reason of the Vladivostok telegram, and its subsequent repudiation makes it nugatory as evidence in the case.

(*b*) It is next claimed that, because the cash account of Clarkson & Co. with the Port Arthur branch showed that 79,000 roubles were sent from Port Arthur between March 25

and June 26, 1904, and 126,128 roubles were collected by the Port Arthur branch from Clarkson & Co. between January 1 and November 23, 1904, this is some evidence that the difference between these amounts, viz., 47,128 roubles, was in part payment, at least, for the Hyades flour.

This argument is a good illustration of the vague and speculative character of all this testimony. The witness Short was merely asked (p. 112) as to how much money was remitted from Port Arthur to Vladivostok between the dates mentioned. He was not asked as to any amounts sent from Vladivostok to Port Arthur. In other words, but one side of the cash account was taken into consideration. To be of any value it must, of course, have been shown that there were no transactions other than that of the Hyades flour between Clarkson & Co. and the bank during this period. Not only is no such claim made, but it affirmatively appears throughout this record that the parties were constantly having many other transactions. On page 27 of the record is shown a statement of Clarkson's account with the Port Arthur branch from December, 1903, to August, 1904. It discloses that during all this time Clarkson & Co. owed the bank varying amounts, from 55,000 roubles down, and that in June Clarkson & Co. had a credit balance which was changed to a debit balance in July and August.

From the fact that the draft was protested for non-payment and mailed Seattle, a presumption arises that it was unpaid. This presumption of non-payment is not met by a showing that the debtor has made to the creditor a payment without the further showing that there were not other dealings between the parties upon which such payment might have been applied. A similar question was decided by the Supreme Court of the State of Wisconsin in Somervail *vs.* Gillies (31 Wis., 152), in which the action of the trial court in instructing the jury that no presumption of payment under such circumstances arose, unless the maker of the note proved that there were no other transactions between the parties, was sustained.

3.

The Sale to Ginsburg.

This transaction is briefly referred to on page 67 of petitioner's brief. It is, however, so frequently woven into the thread of the argument that we now feel it necessary to discuss it more in detail. On April 30, 1904 (new style), Clarkson & Co. cashed at the Port Arthur branch a check of Ginsburg & Company for 67,000 roubles (pages 19-25). On the same day Clarkson & Co. paid into the bank this sum of 67,000 roubles, and instructed the bank to apply it as follows: To the payment of two drafts drawn by the Centennial Mill Company and received through the National Bank of Commerce of Seattle, aggregating the principal sum of 41,542 roubles, together with expenses thereon. The bank did accordingly, on the same day, remit this sum, equivalent to twenty thousand nine hundred eighty-one dollars and thirty-five cents ($20,981.35), to the National Bank of Commerce by telegraphic transfer on Landenburg, Thallman & Company, New York. The remaining amount of the payment of 67,000 roubles, viz., 25,151 roubles 12 cop., was passed to the credit of Clarkson's account at the Port Arthur branch.

This application of the payment of 67,000 roubles was made in accordance with instructions given by Clarkson & Company, the depositor of the money, and the bank was, of course, obliged to make the application in accordance with such instructions. It is now, however, claimed that this sum of 67,000 roubles was in reality a payment of at least a part of the Hyades flour, and that it should have been applied to the payment of the draft in question, notwithstanding these special instructions given by Clarkson.

On behalf of the bank it was testified that they did not know out of what funds Clarkson & Co. gave the check to

pay the draft, but that they presumed that it was taken from the payment by Ginsburg of 67,000 roubles. The full and uncontradicted details of the transaction are shown by the testimony of the witness Friedberg (p. 19) and the witness Drozdov (pp. 38-39). It will be seen that even if the entire sum of 67,000 roubles had been paid into the bank for the Hyades flour, it would not have paid in full the draft in question, which was for 72,389 roubles, with additional expenses, and that the respondent bank did actually receive the greater portion of this sum.

But there is affirmative showing that the flour sold to Ginsburg was not the Hyades flour.

It was stipulated (p. 89) that the Hyades arrived at Port Arthur on January 16, 1904, and left this port on her homeward voyage January 22, 1904; that the Pleiades arrived at Port Arthur on February 7, 1904, and left for her homeward voyage on February 13, 1904.

The only witness for defendant that mentioned this Ginsburg transaction was Davidson, and his testimony shows without contradiction that he at all times spoke of this sale as having been made from the cargo of the ship that reached Port Arthur on or about February 8, that is, the Pleiades. He was not certain of the name of the vessel. Thus at page 138 he said:

> "On or about the 15th day of February, 1904, the Russo-Chinese Bank did consent to the sale of the flour ex steamship 'Hyades,' if that is the name of the steamer that arrived at Port Arthur on or about the 8th of February, 1904."

The testimony of this witness as to the steamer from which the flour was taken is said by the respondent to have been a mistake, but one circumstance has not been called to the attention of the court, and which prevents any question of mistake. This is that Davidson left Port Arthur on January 30, that is, eight days after the Hyades had sailed on her homeward voyage and fourteen days after she had

arrived at Port Arthur to discharge her cargo. He remained absent from Port Arthur until February 9 (p. 147). He testified that on his return "I saw the steamer in the harbor." This, of course, was the Pleiades. Concerning the flour he testified (p. 141):

> "Q. Where was this flour when you arrived?
> "A. Some of it was in the go-downs of Clarkson & Company; some of it was on the foreshore; some of it was still in the lighters, and it is possible that there may have been some of it still undischarged from the steamer."

He then states (p. 142) that he endeavored to get a military or naval guard to watch over the cargo, and being unable to do so, found two Russian civilians, whom he engaged for that purpose. He testified (p. 143):

> "I want to state right here that I saw with my own eyes that afternoon a very considerable quantity of flour being stolen which it was impossible for me to prevent. The whole town was in a chaotic state and the people were, more particularly the Chinese, looting everything in sight."

Having thus identified the cargo of flour as coming from the ship which he then saw in the harbor, and having shown that he personally had a guard placed over it, this witness testified on the direct question at issue as follows (p. 152):

> "Q. Was any of the flour you attempted to sell to Ginsburg & Company part of the Hyades flour?
> "A. The flour I sold to Ginsburg & Company formed a part of the shipment that arrived in Port Arthur on or about the 8th of February, 1904."

The testimony of this witness, therefore, upon which respondent must place its reliance as concerns this Ginsburg transaction, does not leave any ground for a resort to "inference or surmise." It was not changed or modified and, therefore, the only method by which it may be claimed that

the flour sold to Ginsburg was a part of the Hyades cargo is to assume that everything that Davidson said on the subject was error, and to establish the presumption that because a witness states so and so the deduction should be drawn that he meant the opposite.

It is, however, claimed that the evidence discloses that there were only six or eight thousand sacks of flour in Clarkson's warehouse upon the arrival of the Hyades, the bulk of which came from the Centennial Mill Company; that about ten or twelve thousand bags were sold by Clarkson's office between January 30, the time of the acceptance of the draft, and February 4, and that only about fifteen hundred or two thousand bags were received from the Pleiades.

This, however, proves little, because certain factors essential to make the calculation complete are missing. We do not know how much flour was sold from the Clarkson warehouse between the time when Short left, viz., February 4, and the arrival of the Pleiades on February 8. The only testimony as to this period is that given by the witness Davidson, heretofore quoted, where he said that he personally saw a large amount of flour being looted. Certainly this flour was not sold to Ginsburg or any one else, yet by the anomalous result of the judgment the petitioning bank has been compelled to pay for this flour which was so destroyed.

When the Ginsburg money was paid into the bank on April 30 the Hyades draft was not then due. The petitioner requested the court (p. 163) to instruct the jury that in making the application of payment the bank was controlled by the instruction given by Clarkson & Co., and that even if no instructions had been given they could not apply the money to the payment of a draft which was not then due. This instruction was refused and exception noted.

We assert, therefore, that there is no evidence here that the flour sold to Ginsburg had any reference to the draft in question for the following reasons:

(*a*) It concerned another cargo of flour.

(*b*) The larger portion of the sum was actually received by the respondent bank on other drafts.

(*c*) If the 67,000 roubles received from Ginsburg had been applied on this draft it would not have paid it in full.

(*d*) When the Ginsburg payment was made the Hyades draft was not due.

4.

The Consent Given Short.

Respondent relies strongly upon this feature of the case, and in view of the instructions of the trial court it is the principal element in the case.

On the part of the petitioner it was shown by the deposition of the witness Friedberg (p. 42) that Clarkson & Co. never applied to the bank, requesting that they be allowed to settle or dispose of the goods, and that the bank did not have any participation whatever in the sale of the flour (pp. 41, 47).

The original arrangement between the Centennial Mill Company and Clarkson & Company was described by the witness Davidson (p. 153). He said that in October or November, 1898, the witness, in behalf of Clarkson & Co., arranged with Mr. Thompson, of the Centennial Mill Company, by which the Mill Company were to draw on Clarkson & Co. for the value of all flour shipment at ninety days' sight without bank credit.

This provision "without bank credit" shows that the parties must have intended that each draft should be paid out of the proceeds of the sale of the particular cargo given to secure it.

Short testified (p. 108) that the object of getting a ninety days' sight draft was that Clarkson & Co. could get delivery of the flour without payment.

Concerning the particular draft in question, Short said

that he accepted the draft in behalf of Clarkson & Co.; that the documents were then in possession of the bank and were attached to the draft (pp. 109-110); that he knew that the documents were held by the bank to be delivered on payment (p. 106), and that he then gave to the bank a letter of guaranty.

The witness, however, distinctly stated that no document was given by the bank to him or to Clarkson & Co. Neither the bills of lading nor any other papers were executed or delivered by the bank. Indeed, he did not testify that the bank manager told him even that Clarkson might take the flour. He testified (pp. 122-123):

> "Q. And what would the official say—of the bank?
> "A. What would the official say?
> "Q. Yes.
> "A. He would accept the letter of guaranty, and that is all.
> "Q. Did he write nothing at all?
> "A. No, nothing was written at all.
> "Q. He would simply wink the eye or say 'All right,' or something to that effect.
> "A. I didn't pay particular attention to that winking of his eye.
> "Q. But you did know that he said something?
> "A. Yes.
> "Q. And that was——
> "A. (Interrupted.) It was all right and we took the cargo."

If this testimony can be said to legitimately bear out the presumption that the bank manager did then give his consent to the taking of the flour, it nevertheless appears that Short was at the time fully aware of the extent of the bank's authority. He knew that they held the bills of lading against payment; that the bank was holding the draft for collection only; that the steamship company had no right to deliver the flour except upon production of the bills of

lading, and that to do otherwise would subject the agents of the steamship company to a criminal offense.

This alleged "consent," therefore, was nugatory, because it was given to one who knew that the agent from whom it came was exceeding his authority in so doing. Neither Short nor Clarkson & Co., therefore, had any right to rely upon such an unauthorized statement of the bank's manager.

We here invoke the familiar rule that an agent can bind his principal only within the scope of his authority. There is no question of ostensible agency involved, because the actual authorization was known. If, therefore, we may assume that this oral permission was given and that Short acted upon it, nevertheless, it was not a protection, because known to be unauthorized.

Respondent has cited at length the case of National Bank *vs.* City Bank, 103 U. S., 668, asserting that the facts there considered are practically the same as those in the case at bar, and that the principles of law enunciated are decisive of the present case.

The petitioner also is of the opinion that it may rely upon this case as necessitating a reversal of the judgment.

It there appeared that the collecting bank admittedly delivered bills of lading contrary to instructions. The court below had held that this was not even *prima facie* evidence of negligence and granted a non-suit. Two circumstances, neither of which appear in the present case, were instanced as proving that the collecting bank undertook to look after the goods. The first was that the bank upon receipt of the documents wrote:

> "We prefer *after this* not to receive B. L. when we have to look after the property."

The second circumstance was that an additional charge had been made by the collecting bank for its trouble beyond the customary charge for collecting and remitting proceeds of the drafts. This court held:

> "That the collecting bank was the agent of the sending bank and that its measure of responsibility was 'to use due care and diligence in performing the tasks which it had undertaken.' "

That this question of due care and diligence should *have been left to the jury,* saying:

> "We do not decide here that the defendant was negligent. We think there was evidence on which that question should have been left to the jury. We think it should still be left to the jury."

But in the case at bar the trial court did not leave any question of negligence to the jury, but instructed that a verbal permission to take the cargo (which could not have been any more a violation of duty than if the bill of lading had been delivered) was conclusive evidence of negligence on the part of the collecting bank, and that the damages resulting therefrom were, as a matter of law, the face amount of the draft. He also refused to instruct that the collecting bank was bound to use only reasonable care, although the opinion in the cited case said—

> "one of the clear duties of an agent under such circumstances, is to obey instructions, if by a reasonable exercise of diligence and care they can be obeyed."

The cited case also seems to effectively dispose of the fallacy contained in the instruction complained of relative to the absolute ownership of the flour in the Port Arthur branch. If, then, full credence be given to the testimony of the witness Short, it at best could have resulted only in the question of negligence being submitted to the jury. There is here a total absence of instructions as to what was to be done with the flour during the ninety-day period preceding the payment. By the arrangement the Port Arthur branch retained the legal title to the goods and only gave Clarkson & Company authority to make sales and account for the proceeds.

In other words, it was an administration of the security and not a surrender of it. The circumstances of negligence shown in the cited case were much more apparent, and there was not, as in the case at bar, the unusual circumstances resulting from the outbreak of the war, and yet upon this comparatively clear record this court expressly declined to decide that there was any negligence.

Respectfully submitted,

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(30947)

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Supreme Court, U. S.
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In the Supreme Court
OF THE
United States

OCTOBER TERM 1915

RUSSO-CHINESE BANK,
Petitioner,
—vs.—
THE NATIONAL BANK OF COMMERCE OF SEATTLE, WASHINGTON,
Respondent.

No. 244.

Brief of Respondent

E. S. McCORD,
J. A. KERR,
Counsel for Respondent.

Filed this_____day of March, 1916.
JAMES D. MAHER, Clerk.

By_____Deputy Clerk.

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Whether this action be construed as one for return of money paid under a mistake of fact or upon an express written contract by defendant to return the money in case the draft had not been paid, is immaterial, provided the evidence shows either that the draft was paid or that the Port Arthur branch, by reason of its negligence had become liable to defendant for the amount of the draft 5

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In the Supreme Court

OF THE

United States

OCTOBER TERM 1915

RUSSO-CHINESE BANK,
Petitioner,
—vs.—
THE NATIONAL BANK OF COMMERCE OF SEATTLE, WASHINGTON,
Respondent.

No. 244.

BRIEF OF RESPONDENT.

The plaintiff seeks to recover from the defendant the sum of $38,412.19 with interest, being the return of the same amount of money paid to the defendant The National Bank of Commerce of Seattle by the plaintiff, Russo-Chinese Bank in the two

payments made respectively on November 9th, 1904, and December 29th, 1904.

The plaintiff apparently proceeds upon two theories as to the liability of the defendant to repay this money. One theory is that there was an express promise in writing to repay it should it be ascertained that the Port Arthur Branch of the Russo-Chinese Bank had not collected the money on the draft. The other theory is that there was an implied promise to repay the money should it be ascertained that the money had not been collected by the Port Arthur Branch, because in that case the money was advanced and paid to the defendant upon a mistake of fact.

The Circuit Court of Appeals for the Ninth Circuit had occasion to twice consider the controversy. The first opinion of the Circuit Court of Appeals is found in 187 Federal Reporter, page 80. The second opinion is found in 206 Federal Reporter, page 646. The Court in its first opinion held that the allegations of the complaint "stated a cause of action upon an implied agreement to restore money paid to the defendant under a mistake of fact."

On page 37 of the brief of the plaintiff filed in the Circuit Court of Appeals (in 187 Federal, page 80) counsel for plaintiff said:

"It is, however, submitted that the issues framed by the pleadings in this case do not show an attempt to recover upon an express contract but upon an implied agreement to restore money which had been paid under a mistake of fact."

Taking this contention of counsel in the light of the opinion of the Circuit Court of Appeals it must be assumed that the issues were construed as stating a cause of action for the recovery of money paid under a mistake of fact and not upon an express contract for the return of the money.

This interpretation and construction of the complaint, therefore, became the law of the case and it became the duty of the District Court to have adopted the same construction placed upon the complaint by the appellate court.

The trial court in its instructions to the jury submitted the case upon both of the theories above stated. First: that the plaintiff might recover upon an express promise on the part of the defendant to repay the amount of the draft should it be ascertained that the plaintiff had not collected the money on the draft; and Second: upon an implied promise to repay the money alleged to have been paid under a mistake of fact. In this connection we might say that the plaintiff was treated with more liberality by

the trial court than it was entitled to receive. But viewed from the standpoint of either theory of the complaint the result is the same in the light of the evidence upon which the case was submitted to the jury.

The affirmative defenses in the answer of the defendant were:

First: That the draft had been paid.

Second: That the Russo-Chinese Bank, as the holder of the draft and bills of lading, was required under the law and custom among banks, to protest the draft for non-acceptance and non-payment and to look after, protect and care for the flour covered by the bills of lading upon its arrival at Port Arthur, and, to warehouse the same in an independent warehouse, and not permit the flour to be appropriated by Clarkson & Company.

Third: That if the proceeds of the flour were not applied toward the payment of the draft secured by the bills of lading it was due to carelessness and negligence on the part of the plaintiff. That if the flour was appropriated by Clarkson & Company to their own use such appropriation was due to the gross carelessness and negligence of the plaintiff, for which the defendant was in no wise responsible.

The letter of the plaintiff to the defendant under date of November 9th, 1904, says:

"It remains of course however understood that in case your above remittance proves not to have been paid for by Clarkson and Company you are held responsible to refund the amount of our to-day's check.

We beg to add that we have no knowledge of the exact conditions established between you and our Port Arthur Branch for the collection of your documentary bills and shall, therefore, have to come back upon the matter in case we should learn later on that our calculation is not correct or that we should have deducted other charges." (Transcript p. 68.)

The letter of December 5th, 1904, from the defendant to the plaintiff acknowledging receipt of the draft, says:

"The draft to this date would amount to $38,312.19, leaving a balance due us of $2,298.49, which we would respectfully request you remit us by return mail. We, upon our part, agree, upon return to us of both sets of bills, showing that the draft has not been paid, to reimburse you in the sum paid us, provided that we were in no wise injured by the fact that your Port Arthur Branch has indefinitely held the bills after their maturity, at which time they could have been returned to us and we could have collected from the Steamship Company." (Transcript p. 69).

Whether this action be construed to be one for the return of money paid under a mistake of fact

or one upon an express written contract on the part of the defendant to return the money in case the draft had not been paid, it conclusively follows that the plaintiff will not be entitled to recover in this action if the evidence shows, either that the draft was paid or that the Port Arthur Branch had become liable to the defendant, by reason of its negligence, for the amount of the draft. The defendant in its letter of December 5th, 1904, acknowledging receipt of the draft only agreed to return the amount of the draft if it had not been prevented by the action of the plaintiff from collecting the value of the shipment from the Steamship Company. The Port Arthur Branch acknowledged the receipt of the defendant's letter on December 29th, 1904, and must be held to have assented to the condition placed upon the agreement by the defendant to return the money contained in the letter of December 5th, because on December 29th, 1904, the plaintiff remitted the additional sum of $2,298.49 in accordance with the condition placed upon the original remittance by the defendant. (Transcript pp. 69-70).

If the action be one for the recovery of money under an express contract, then the plaintiff would not be entitled to recover if, by its actions in handling

the bills of lading, it released the Steamship Company from any liability to the defendant.

The burden is, of course, upon the plaintiff to establish the allegations of its complaint, and to prove that the draft had not been paid and that the Steamship Company was not released from liability through its negligence and that at the time the remittance was made on November 9th, 1904, by the plaintiff to the defendant, the plaintiff was not indebted to the defendant in the amount of the remittances made on that date, and on December 29th, 1904. If the plaintiff, at the time of these remittances to the defendant, was liable to the defendant bank for the amount thereof, either through the payment of the original draft or by reason of its negligence, of course it cannot recover. There would be no consideration for the promise to repay the money and there would have been no payment of the amount of the original draft due to any mistake of fact.

Under the plea of payment, and certainly under the plea of negligence upon the part of the plaintiff, the defendant would be permitted to show that the draft had been paid in money or by the check or promissory note of Clarkson & Co., and would be permitted to show facts rendering the Port Arthur

Branch liable to it by reason of the negligent handling of the shipment by the plaintiff.

The evidence shows that the Port Arthur Branch received from Clarkson & Company prior to the date of the remittance large sums of money, which could only have been realized from the proceeds of the sale of the flour covered by the bills of lading securing the original draft, and in addition thereto the evidence shows that the Port Arthur Branch accepted, in lieu of money for the draft the promise of Clarkson to sell the flour and pay the proceeds to the bank; that the Port Arthur Branch, as the legal holder of the bills of lading directed the Steamship Company to deliver the flour to Clarkson & Company, merchants, thereby releasing the Steamship Company, and that it permitted Clarkson & Company, in disregard of its instructions from the defendant, to take over the flour and sell it. If the evidence establishes any of these facts, and we contend that it does, the Port Arthur Branch became liable to the defendant for the amount of the original draft prior to the remittance of November 9th, 1904.

"Upon the plea of payment, to debt on bond, it is competent for the defendant to give in evidence, that wheat was delivered to the plaintiff, on account of the bond, at a certain price; and that the defend-

ant assigned sundry debts to the plaintiff, part of which were collected by the plaintiff, and part lost by his indulgence or negligence."

Buddicum vs. Kirk, 3 Cranch, 294.

"Where the owner of goods shipped them upon a bill of lading whereby they were consigned to his own order, at the same time drawing in favor of a banking partnership 'for collection' a draft upon the person to whom the goods were intended to be delivered upon payment of the draft, and also attaching to the draft the bill of lading so endorsed as to give the partnership control of the possession of the goods, a delivery of them by this firm to the drawee of the draft, without requiring its payment was, as against the owner, a conversion."

Hobbs et al. vs. Chicago Packing & Provision Co., 98 Ga. 567; 25 S. E., 584; 58 Am. St. Rep. 320.

The flour was collateral security for the payment of the draft in question and it is a well settled principle of law that where a pledgee, without specific instructions takes over the collateral or releases the collateral from the pledge such release operates in law as payment of the claim, at least to the extent of the value of the collateral.

"It is a general rule that where collateral security is received for a debt with power to convert the security into money, this is specifically applicable to the payment of such debt; the same person being

the party to pay and receive, no act is necessary, and the law makes the application; if the proceeds equal or exceed the amount of the debt, it is *de facto* paid; no action would lie for it; and proof of these facts would support the defense of payment. It is like the ordinary case of a banker or factor, receiving securities of his principal, by indorsement or otherwise, on which he has a lien for his advances; when received the proceeds operate as payment *pro tanto*. It follows as a necessary consequence that an amount equal to the existing debt can only be applied; the debt is then satisfied and discharged, and if there be a surplus it is money had and received to the use of the indorser, the beneficial proprietor of the note."

Hunt vs. Nevers, 15 Pick. 500, 26 Am. Dec. 616.

"When the collateral note is collected and the proceeds received by the pledgee, it operates as a payment *pro tanto* of the debt secured."

2 Randolph on Commercial Paper, Sec. 795.

In *Cocke vs. Chaney*, 14 Ala., 65, it is held that when a creditor who has received a note as collateral security transfers it to another he must be understood to have elected that mode of payment and to have made the security a substitute for the debt.

Westphal vs. Ludlow, 6 Fed., 348.

The jury returned a general verdict in favor of the defendant and also returned the following special verdict, to-wit:

"We, the jury, find that the Port Arthur Branch of the Russo-Chinese Bank did receive payment for the draft dated December 11th, 1903, on account of which plaintiff made the remittance to the defendant alleged in the complaint." (Transcript p. 13).

The special finding was submitted by the court to the jury at the request of the plaintiff.

As was said by the Circuit Court of Appeals (206 Fed. p. 650):

"It is manifest that if the special issue in response to which the special verdict was returned was supported by sufficient evidence and there was no substantial error in the admission or rejection of evidence bearing upon it and the jury was not wrongfully instructed in respect to that question the judgment must be affirmed."

It is the contention of the defendant that:

First: There was sufficient evidence to support the special verdict.

Second: That the jury was properly instructed in respect to that question.

Third: That there was no error in the admission or rejection of the evidence bearing upon it.

1.—*Sufficient Evidence of Payment of Draft of December* 11, 1903, *for* $36,194.80 *prior to Remittance by Plaintiff to Defendant of Amount Sought to be Recovered in this Action.*

There was an abundance of competent testi-

mony introduced on the part of the defendant sufficient to support the special finding of the jury and a portion of this testimony we shall briefly summarize by reference to the record.

(a) The Russo-Chinese Bank is a corporation with branches at Vladivostock, Port Arthur, Shanghai and elsewhere, but the various branches and the home bank at St. Petersburg constitute but a single corporation.

The Vladivostock Branch of the Russo-Chinese Bank about May 19th, 1904, telegraphed to the Shanghai Branch stating that all of the drafts of the Centennial Mill Company drawn through The National Bank of Commerce of Seattle had been paid. (Transcript p. 67).

It is true that the officials of the plaintiff bank testified that this telegram was sent at the request of Clarkson & Company and without any knowledge on the part of the Vladivostock Bank as to whether or not the drafts, including the one in controversy, had been paid. But the jury might well have believed that the Vladivostock branch was authorized to make such statement and to send such telegram. Port Arthur was almost entirely cut off from the outside world during the spring and summer of 1904.

Only telegrams of the Russo-Chinese Bank to its branches were permitted to be passed into the city by the Japanese authorities. Clarkson could not have any direct communication with the bank at Port Arthur. The only means of communication on the part of Clarkson was through the branch banks. His only source of information was through the Vladivostock branch. It is inconceivable that the Vladivostock branch of the Russo-Chinese Bank would have sent such a telegram upon the statement of Clarkson alone, because that branch bank knew that Clarkson had no direct information as to whether the drafts had been paid and that he could have no information upon that subject except such as he acquired through the Vladivostock branch, which was permitted to communicate by wire with the Port Arthur branch of the same bank.

In reference to this telegram Clarkson on October 27th, 1906, wired the Russo-Chinese Bank at St. Petersburg as follows:

"I confirm that telegram of Vladivostock Branch to Shanghai branch was sent at my request, but still think that Port Arthur Branch kept back money to pay the draft. Let St. Petersburg send Port Arthur account so I can make out how the business actually stands, Clarkson, October 27, 1906." (Transcript p. 84).

And in the same connection Clarkson, on behalf of the plaintiff stated:

"I am unable up to the present time to say whether I was mistaken in my statement that the draft had been paid, or not." (Transcript p. 84).

The plaintiff in this action, through its Vladivostock branch therefore admitted that the draft in question had been paid. The fact that this telegram from Vladivostock was sent to the Shanghai branch and exhibited to defendant's representative was nowhere disputed in the record. Explanations were given by the witnesses for the plaintiff to the effect that it was sent without the authority of the Port Arthur Branch but the Vladivostock Branch had the same power to bind the bank by its admission that the Port Arthur branch had. In a word,—there was a conflict in the testimony as to the Vladivostock telegram to the Shanghai branch. The weight to be attached to the testimony was a matter entirely within the province of the jury.

(b) The evidence shows that 79,000 rubles were transmitted from the Port Arthur Bank to the Vladivostock Bank between the 25th of March and the 26th of June, 1904, and that between January 1st, 1904, and November 23d, 1904, 126,128 rubles were collected from Clarkson & Company by the Port Ar-

thur Bank; that the same was appropriated by the Port Arthur Bank and applied toward the liquidation of the indebtedness of Clarkson to the plaintiff (Transcript pp. 112-113). The evidence further shows that at the time of the commencement of hostilities between Russia and Japan there were only six or eight thousand sacks of flour in Clarkson's warehouse at Port Arthur (Transcript p. 104); that ten or twelve thousand sacks of flour were sold between the date of the acceptance of the draft and the 4th of February, 1904 (Transcript p. 105). That there were always outstanding unpaid accounts for the sale of flour of from 20,000 to 30,000 rubles (Transcript p. 128); that the flour received by the Hyades was 36,000 sacks; that 1500 to 2000 sacks were received by the Pleiades about February 9th or 10th (Transcript p. 105). There was in the warehouse of Clarkson at Port Arthur about ten or fifteen thousand rubles worth of rack-a-rock and beer of the value of 2,000 rubles (Transcript p. 113). Computing the flour at the valuation placed upon it by Short at 2.40 rubles per sack, the value of this flour would be 109,-200 rubles. Adding the value of the flour to the value of the other commodities and the 30,000 rubles

owing from the Chinese contractor we have a total of 156,000 rubles. This represents the entire resources of Clarkson & Company at Port Arthur between January 1st and the commencement of the Japanese blockade. The money that was collected by the bank at Port Arthur and remitted to Vladivostock was 79,000 rubles, and the amount of the Ginsburg check, admittedly received by the bank was 67,000, making a total of 146,000 rubles that the record shows the bank at Port Arthur received necessarily from the sale of Clarkson's merchandise, included in which were the flour shipments securing the draft of $36,194.80. Clarkson had no other resources at Port Arthur from which payments could have been made. It was impossible for him at Port Arthur after the Japanese blockade to have received any additional goods. The bank did receive then at Port Arthur the proceeds from the sale of the flour covered by the bills of lading securing the draft sent for collection by the defendant and must have known at the time it received this money that it represented the proceeds of the sale of the flour covered by the bills of lading securing the drafts held by the bank for collection for the account of the defendant.

Moreover, Davidson testified that:

"On or about the 15th of February, 1904, I personally notified the at that time manager of the Port Arthur Branch of the Russo-Chinese Bank that I could not get in communication by telegraph with the head office of Clarkson & Company; that I had been ordered to leave Port Arthur by the Russian military authorities and that for these two reasons and as there was no one there that I could leave in charge of the affairs of Clarkson & Company I had made arrangements with a Russian firm by the name of Ginsburg & Company to take over the flour and pay the draft," (of December 11th, 1903) "to which arrangement the Russo-Chinese Bank consented, and as I left Port Arthur on the 17th of February, 1904, I do not know whether the bank required Ginsburg & Company to sign a letter of hypothecation." (Transcript p. 139).

Davidson further testified as follows:

"Q. State whether or not Clarkson & Company disposed of any part of that shipment of flour?

A. Clarkson & Company entered into an agreement with Ginsburg & Company to sell part of this flour, the actual quantity to be determined when delivery was taken.

Q. What were the terms of sale?

A. I cannot remember the exact figures but Ginsburg & Company paid me a certain amount per sack, and the balance, sufficient to meet the draft, was to be paid when the flour was counted. Ginsburg & Company were unable to pay the full value of the flour at that time for the very good reason that the bank being short of funds simply closed its doors and stopped doing business and consequently Ginsburg & Company could not get the money with which to meet the payments. (Transcript p. 143).

Q. What were the terms as to delivery?

A. There were no particular terms. Ginsburg & Company were handed the keys of the warehouse by me and they agreed to make payment to the Russo-Chinese Bank against the particular draft as soon as they had counted the floor and as soon as the bank was put in funds.

Q. Was the Russo-Chinese Bank cognizant of the transaction?

A. Yes, sir, they were.

Q. Did they make any objection to this sale?

A. No objections were raised. (Transcript p. 144).

"I therefore sold the flour at a price which enabled Clarkson & Company to make a reasonable profit, for which approximate profit Ginsburg & Company gave me a draft on Shanghai and the balance of the proceeds of the sale was to be paid by Ginsburg & Company into the bank, the Russo-Chinese Bank, against the draft for the Centennial Mill Company. This arrangement was made known to the Russo-Chinese Bank by me and I believe Mr. Ginsburg accompanied me to the Russo-Chinese Bank when I acquainted them with the terms of this arrangement." (Transcript p. 144).

Q. And were there not two separate bills of sale made by you to Ginsburg & Company for that flour, one at 2 rubles and the other at 2.40?

A. It is quite true that there were two prices arranged by me with Ginsburg & Company. *The lower price was sufficient to meet the draft.*

I made the sale to Ginsburg & Company at what

I considered a fair market value under the circumstances, namely, that I had to leave Port Arthur and that there was no one there I considered eligible to succeed me. The profit was 20 to 25 per cent as near as I can remember. I arranged that a sufficient part of the profits of the sale to meet the draft should be paid into the Russo-Chinese Bank." (Transcript p. 151).

The Russo-Chinese Bank at Port Arthur held for collection the draft of $36,194.80 which was secured by a bill of lading covering 36,000 sacks of flour. This must have been all of the flour then in Clarkson's warehouse and none reached there afterwards. On the arrival of the Hyades there was on hand from six to eight thousand sacks, which with the 36,000 unloaded from the Hyades made a total of 44,000 sacks, of which ten or twelve thousand sacks were sold during the time intervening between the date of the acceptance of the draft and the 4th of February when Short severed his connection with Clarkson & Company. This would leave about 34,000 sacks of flour, to which should be added 1500 to 2000 sacks that came on the Pleiades, making about 36,000 sacks, and Davidson says he sold this flour to Ginsburg & Company, with the consent of the Port Arthur Bank and received in payment a draft on Shanghai for a sum in excess of the amount necessary to take up the draft. The value of this flour at

2 rubles per sack would amount to exactly the sum necessary to take up the draft in question. Davidson says that the bank consented, and allowed Clarkson & Company, through Davidson, to consummate the sale of the flour to Ginsburg and that Ginsburg had a credit in the bank at the time sufficient to have paid the draft in cash at once out of such proceeds, but that the bank was unwilling to allow him to do so because of its own shortage of funds. The bank not only consented that Clarkson should sell the flour but affirmatively participated in the negotiations for the sale, and knew at the time of the sale that Ginsburg had agreed to pay for the flour and that the proceeds were to be applied to take up the draft in question.

Davidson left Port Arthur on the 17th of February, 1904. Shortly thereafter the Port Arthur Bank received notice from Clarkson & Company that Davidson had sold a quantity of flour, or practically all the flour in Clarkson's warehouse, to Ginsburg at a very much reduced price and the Port Arthur Bank was requested to prevent the consummation of the sale, and the bank did interfere in the matter and prevent the consummation of the sale of the flour to Ginsburg at 2 rubles per sack, the price agreed

upon between Ginsburg and Davidson, and compelled Ginsburg to pay 2.40 rubles for the flour. (Transcript p. 86).

Clarkson, a witness for the plaintiff, testified:

Q. Did not the Russo-Chinese Bank, acting under your instructions, refuse to permit Ginsburg & Company to take the flour at the price agreed upon between Ginsburg and Davidson, and did not Ginsburg agree with the bank to pay an additional sum for the flour in order to get it?

A. Acting under instructions from me, the bank in Port Arthur refused to let Ginsburg & Company have the flour at rubles 2, whereupon Ginsburg & Company agreed to pay rubles 2.40."

This testimony discloses that the bank did take control of the flour, which had already been delivered to Ginsburg by Davidson and later on received from Ginsburg at least 67,000 rubles, to which we shall hereafter refer.

Short, in his testimony stated that he advised the Port Arthur Bank of the arrival of the Hyades flour and received permission from the bank to sell it; that he agreed to account to the bank for the proceeds of the sale thereof when made by Clarkson & Company. So far as this particular shipment of flour, securing the draft of December 11th, 1903, is concerned, the actual control and custody of the flour is traced to the bank at Port Arthur, and with the

power in its hands to collect the proceeds with which to pay the draft it nevertheless allowed the proceeds of the sale of the flour to be diverted to other purposes, and it must have known that practically all of the proceeds collected by it from Clarkson & Company were realized from the sale of the flour securing payment of drafts held by it for collection, and notwithstanding this knowledge in disregard of its duties as the agent of The National Bank of Commerce it nevertheless withdrew from Clarkson & Company at least 79,000 rubles between March 25th and June 26th, 1904, and caused said proceeds to be sent to Vladivostock for the credit of Clarkson & Company, who was indebted to the bank in a sum of nearly one million rubles. On the 28th of January Clarkson & Company owed the Port Arthur Bank 49,136.20 rubles. The bank collected from Clarkson & Company at Port Arthur a sum sufficient to wipe out this indebtedness and to give Clarkson & Company a credit balance of 10,586.45 rubles, on June 28th, 1904. (Transcript p. 27.)

The bank, therefore, received from Clarkson & Company—manifestly from the proceeds of the sale of the flour securing the draft in question and other drafts held by it for collection for The National Bank

of Commerce—a sum of about 59,000 rubles, and we think the evidence is abundant to sustain our contention that the Port Arthur Branch received from Clarkson & Company the proceeds of the sale of the pledged flour for its own use a sum far in excess of the amount necessary to take up the draft. It appropriated this money to its own use and collected its own debt from Clarkson & Company and disregarded its duty to faithfully protect the interests of The National Bank of Commerce for whom it had undertaken the duty of the collection of the drafts.

This evidence was admissible under the plea of payment and also admissible under the defense that the bank permitted Clarkson & Company to sell the flour and that the bank appropriated the proceeds of the sale thereof to the payment of the indebtedness owing by Clarkson & Company to the Port Arthur Bank.

And again, on the 30th of April, 1904, as admitted by the bank's witnesses, Clarkson paid over to the Russo-Chinese Bank at Port Arthur 67,000 rubles, part of the proceeds of the sale of the flour to Ginsburg, and the jury was justified in reaching the conclusion that this money was the proceeds of the sale of the Hyades flour, covered by the bills of lading

held by the Port Arthur Bank to secure the draft of $36,194.80. The Port Arthur Bank, knowing that it had in its possession drafts covered by bills of lading could not be permitted to blindly close its eyes and allow Clarkson to sell this flour and then appropriate the proceeds thereof to any other purpose than the payment of the drafts secured by the same. During a state of war, with Clarkson himself absent and their managers driven out of the city, could it be possible that the officials of the bank did not visit Clarkson's warehouse and obtain actual knowledge of the stock belonging to Clarkson and which was being sold? If they had this knowledge that the proceeds of the sale were largely coming from the flour, it would be unconscionable to permit the Port Arthur Bank to close its eyes and say it did not know the source from which the money being paid to them by Clarkson came; and with such knowledge as to the source from which the money came the Port Arthur Bank cannot be permitted to say it did not receive payment of the draft in question.

The Port Arthur Bank further admitted that on April 30th, 1904, it received 67,000 rubles from Ginsburg, placed 25,000 rubles to the credit of Clarkson and remitted the balance to The National Bank

of Commerce on account of other drafts which it held for collection; yet the evidence shows that at this time Clarkson & Company was indebted to the Russo-Chinese Bank in the sum of 900,000 rubles. Clarkson denied this indebtedness, but finally compromised on a basis of 231,000 rubles. (Transcript p. 85).

The record also shows that there had been many other similar drafts sent by The National Bank of Commerce to the Port Arthur Bank for flour sold by the Centennial Mill Company and that the plaintiff bank was familiar with the business of Clarkson & Company, and indeed was mainly instrumental in its establishment, having advanced, according to the testimony of Davidson, Clarkson's entire investment in the Port Arthur business.

The evidence to which we have referred we think establishes the fact beyond question:

1. That the draft was paid directly.

2. If not paid directly, then the bank by its wrongful act in appropriating the proceeds of the sale of the flour to its own use rendered itself liable to The National Bank of Commerce for the full amount of the draft and became indebted to The National Bank of Commerce for the amount of the draft, and therefore at the time it made the remittances in

November and December, 1904, which it is seeking to recover in this action, it was indebted to The National Bank of Commerce in the full amount of the remittances which the plaintiff now seeks to recover.

When an agent in the handling of a collection by its negligence causes a loss to its principal, the amount of the draft is *prima facie* the measure of the damages, but it is subject to rebuttal. In any event the measure of damages is the value of the shipment and in this case the uncontradicted evidence discloses that the value of the flour was at least 2 roubles per sack, and this demonstrates that the value of the flour in question at least equalled the amount of the draft.

If there were no other evidence in the case we think there was abundance to justify the jury in making the special finding that the draft had been paid by Clarkson & Company to the Port Arthur Bank prior to the date of the remittances of November and December, 1904, the amounts sought to be recovered in this action.

2. *The plaintiff rendered itself liable to the defendant for the value of the flour, which at least equalled the amount of the draft of December* 11*th*, 1903, *by disregarding defendant's instruction to de-*

liver the draft only upon payment, by surrendering the flour to Clarkson & Company and assisting in the sale of the same, and by requiring of Clarkson & Company the execution of a letter of guaranty or hypothecation, which acts operated as payment of the original draft.

But the defendant is not compelled in order to establish the payment of the draft of December 11th, 1903, to rely upon the evidence of direct payment to which we have heretofore referred, and the jury was fully justified in reaching the conclusion that the draft had been paid from other undisputed evidence in the case.

The draft out of which this controversy has arisen, dated December 11th, 1903, for $36,194.80, secured by bills of lading and other documents, was sent by The National Bank of Commerce of Seattle to the Russo-Chinese Bank at Port Arthur with specific instructions that the documents were to be delivered only upon payment. (Transcript p. 32). The flour described in the bill of lading arrived at Port Arthur about the 20th or 25th of January, 1904 (Transcript p. 103). On the day of its arrival or the succeeding day, the draft was accepted by Clarkson & Company, and simultaneously with its acceptance

the Russo-Chinese Bank instructed Clarkson & Company, the agents of the steamship company that had issued the bills of lading, to deliver the flour to Clarkson & Company, merchants, and directed and permitted Clarkson & Company, merchants, to sell the flour, and required Clarkson & Company, merchants, to give to the bank a letter of guaranty by the terms of which Clarkson & Company, merchants, recognized the ownership of the flour in the Russo-Chinese Bank and agreed to proceed to sell the flour from time to time in the ordinary course of business and to account to the Russo-Chinese Bank for the proceeds of the sale of the said flour.

The Russo-Chinese Bank disregarded the instructions of The National Bank of Commerce to deliver the documents only upon payment. The evidence tends to show that the Port Arthur branch did retain the documents but as the legal holder of these documents directed the agent of the steamship company to release the flour to Clarkson & Company, accepting in lieu thereof Clarkson's obligation to pay for the same. The Port Arthur branch, instead of receiving money in payment for the draft, in disregard of its instructions from The National Bank of Commerce, received Clarkson's obligation in lieu

thereof and permitted Clarkson to sell the flour and by doing so elected to take over the draft and make it its own, and thereby became liable to The National Bank of Commerce. The Port Arthur branch, by its actions and agreements elected to receive in payment of the draft Clarkson's promise to sell the flour and to account to the bank for the proceeds thereof in lieu of the money, and the draft, so far as the Port Arthur branch is concerned, was paid.

The bills of lading were collateral to the draft and were pledged for its payment. Under the statutes of the State of Washington they were negotiable instruments, and the endorsement and delivery thereof transferred the legal title to the documents to the Russo-Chinese Bank, and the legal effect of the transaction was to transfer the legal title to the flour covered by the bills of lading to the plaintiff.

"All bills of lading and transportation receipts of every kind are hereby declared negotiable, and may be transferred by endorsement of the party to whose order such check or receipt was given or issued, and such endorsement shall be deemed a valid transfer of the commodity represented by such receipt and may be made in blank or to the order of another."

2 Rem. & Bal. Code, Sec. 3377.

"When a bill of lading or warehouse receipt is

made to 'bearer' or in equivalent terms, a simple transfer thereof by delivery conveys the same title as an endorsement."

2 Rem. & Bal. Code, Sec. 3379.

So that the Russo-Chinese Bank, under the laws of the State of Washington, held the legal title to the flour securing the draft. It not only had the legal title to the bills of lading, but had the legal title to the flour itself. The statute above quoted is the law of the State of Washington and in the absence of proof to the contrary must be regarded as the law of Port Arthur regulating bills of lading.

"A statute of a state making bills of lading negotiable means that they may be transferred by endorsement and delivery so as to give the endorsee a right to sue on them in his own name. * * *

Bills of lading are regarded as so much cotton, grain, iron, or other articles of merchandise, which are very often sold or pledged by the transfer of the bills of lading which cover them."

Shaw vs. Merchants Nat'l. Bank., 101 U. S., 557, 25 L. Ed. 892.

"The endorsements by the shipper to plaintiff of receipts taken in payment of cattle transferred their title and gave plaintiff the right to their possession and, if necessary, to sell them for payment of drafts taken by him against the shipment."

North. Pa. R. Co. vs. Commercial Nat'l Bank, 123 U. S. 727, 31 L. Ed. 287, 8 Sup. Ct. Rep. 266.

"Bills of lading stand as the substitute and representative of the goods described therein, and, while *quasi*-negotiable instruments, are not negotiable in the full sense in which that term is applied to bills and notes. The transfer of the bill passes to the transferee the title to the goods described, and the presumption as to the ownership arising from the bill may be explained or rebutted by other evidence showing where the real ownership lies. A pledgee to whom a bill of lading is given as security gets the legal title to the goods and the right of possession only if such is the intention of the parties, and that intention is open to explanation."

The Carlos F. Roses, 177 U. S. 655, 44 L. Ed. 929, 20 Sup. Ct. Rep. 803.

The legal title, therefore, both under the statutes of the State of Washington and under the general rules of law, to the bills of lading as well as the flour represented by it, passed to the Russo-Chinese Bank under the endorsements and deliveries of the draft and the bills of lading to it by The National Bank of Commerce.

The Russo-Chinese Bank was, therefore, the legal owner and holder of the draft in question together with the bills of lading and the flour represented by the same as against all the world, *except The National Bank of Commerce of Seattle.*

The evidence of Mr. Short shows that the Russo-Chinese Bank, which held the legal title to the bills

of lading and the flour, notified Clarkson & Company, who were the agents of the steamship company, through Short, that delivery of the flour should be made to Clarkson & Company, merchants, and that the flour should be sold by that company. This evidence was not contradicted. By this action on the part of the Port Arthur branch the steamship company was relieved from liability upon its bills of lading. The Russo-Chinese Bank by its action in taking over the flour itself and consenting to the sale of it by Clarkson upon his promise to account to that bank for the proceeds of the sale thereof, released the steamship company and placed it beyond the power of The National Bank of Commerce to resort to any remedy it may have had against the steamship company. The steamship company had the right to release the flour upon the production of the bills of lading. The bills of lading were held by the Port Arthur Bank. If the Port Arthur Bank held the legal title to and possession of the bills of lading that bank was the only person who had the legal right to direct the steamship company to release the flour; and the evidence is uncontradicted that the Port Arthur Bank directed the steamship company to deliver the flour to Clarkson & Company, merchants.

No other person had the right to direct the steamship company to release the flour,—not even the consignee of the flour, the Centennial Mill Company, could have exercised such right.

In the case of *The First National Bank of Pullman vs. Northern Pacific Railway Company*, 28 Wash., 439, 68 Pac. 965, the Court held that the Railway Company was not authorized to release a shipment to any one except the holder of the bill of lading, and held the Railway Company liable for the release of the shipment to the consignee, even upon the order of the consignor of the wheat.

"A bill of lading is negotiable and under this section when made to 'bearer' or in equivalent terms, a simple transfer thereof by delivery conveys the same title as an endorsement; hence the power of endorsement is not restricted to the consignee, but the carrier who has delivered such bill of lading to the shipper is conclusively charged with knowledge of the fact, and of its negotiability, both by custom and statute."

First National Bank of Pullman vs. N. P. Ry. Co., supra.

The case of *Milwaukee National Bank of Wisconsin vs. City Bank*, 103 U. S. 668, 26 L. Ed. 417, holds that a bank which received from another checks, drafts, or bills of lading for wheat, with instructions

to deliver the wheat to another on payment of the drafts and acknowledging the receipt of the drafts, becomes the agent of the transmitting bank in the business which it has undertaken, and the instructions implied that the bank which by the bills of lading was invested with full right to the possession of the wheat, should not deliver it except upon the payment of all the drafts drawn against each cargo of wheat.

The facts in the last named case are very similar to those involved in the present case. A. F. Smith & Company were the owners of the Corn Exchange Elevator at Oswego, New York, in which they were engaged in the general business of elevating and storing grain for the public. They were also large dealers in grain on their own account. In September, 1869, Mower, Church & Bell, who were commission merchants in Milwaukee, received orders from Smith & Company to purchase for them two cargoes of wheat and to draw on them for the purchase price money against each cargo. The cargoes were bought and sight drafts for a part of the purchase money and time drafts for the other part were in each instance drawn on A. F. Smith & Company. These drafts were purchased by the Milwaukee bank, which

also received the bills of lading for the wheat. The bills described Mower, Church & Bell as the shippers and by their terms the cargo in each case was to be delivered at Oswego. The Milwaukee bank enclosed the drafts and the accompanying bills of lading to the City Bank at Oswego with instructions to deliver the drafts only upon payment. The letter enclosing the drafts and the bills of lading was duly received by the City Bank and on presentation to A. F. Smith & Company they paid the sight drafts and accepted the time drafts. When the vessels arrived at Oswego the masters reported to the cashier of the City Bank, who made the following endorsement on each bill of lading held by the masters: "Deliver to the Corn Exchange Elevator for account of T. L. Baker, Cashier, Milwaukee, subject to order of City Bank, Oswego."

A. F. Smith sold and shipped off the wheat after it had been put in their elevator and failed before the time drafts fell due, which were duly protested for non-payment, and have never been paid. The Milwaukee bank sued the City Bank to recover their loss on the drafts on the ground that the City Bank had delivered the wheat to Smith & Company before the drafts were paid, contrary to the instructions which accompanied the drafts and the bills of lading.

"The City Bank in receiving the drafts and bills of lading in letters which instructed it to deliver the wheat to A. F. Smith & Company in payment of the drafts, and acknowledging the receipt of these drafts, became the agent of the Milwaukee bank in the business which it had undertaken. Whatever obligation might, under the other circumstances be imposed upon the bank by its consent, to receive the drafts and bills of lading, it, in the present case, received them with instructions which the bills of lading empowered it to execute, namely, to control the possession of the wheat until the drafts on Smith & Company were paid. * * * The bank also undertook to discharge this duty when the masters of the vessels, presenting themselves and cargo to the cashier of the City Bank for delivery were directed by him in writing to deliver to the Corn Exchange Elevator. It, therefore, undertook to discharge a duty as agent of the Milwaukee bank in regard to the custody of the wheat, under instructions that it should deliver it to Smith & Company on payment of the drafts."

Milwaukee Nt'l. Bank vs. City Bank, supra.

"What then is the measure of its obligation as such agent to the plaintiff bank?

We suppose that there can be no question that it should use due care and diligence in performing the task which it set itself to do.

One of the clear duties of an agent, under such circumstances, is to obey instructions, if they can be obeyed by a reasonable exercise of diligence and care.

We think the instructions in this case very clearly implied that the bank, which by the bill of lading was invested with the full right to the possession of the wheat, should not deliver it to A. F. Smith & Com-

pany except upon the payment of the drafts; that is, of all the drafts drawn against each cargo of wheat. The reasons for this are very plain. The wheat had been bought by Mower, Church & Bell, in Milwaukee, for A. F. Smith & Company, but they had to raise the money to pay for it by drafts on the latter. These drafts could only be negotiated by placing the control of the wheat in the hands of the purchasers of the drafts as security for their payment. The sight drafts were paid by Smith & Company when the wheat arrived in Oswego. There remained unpaid, however, the time drafts, and the instruction of the Milwaukee bank to its agent the City Bank, was not to part with the possession and control of this wheat to Smith & Company until those drafts were paid. It was the only security the bank had for its payment, and it was ample.

As we have already said, A. F. Smith & Company were the owners and managers of the Corn Exchange Elevator. It is proved that the officers of the bank knew this. The cashier of the City Bank therefore knew that when he made the order on the bills of lading for the delivery of the wheat to the Corn Exchange Elevator he was ordering its delivery to A. F. Smith & Company. It was by reason of this delivery and the failure of Smith & Company that the amount of the drafts was lost to plaintiff."

Milwaukee Nat'l. Bank vs. City Bank, supra.

"Did the defendant bank, therefore, under the circumstances of the case, exercise due care and diligence in storing this wheat in the Corn Exchange Elevator?

The Judge took this question from the jury and decided it in favor of the defendant. We are of the opinion that in this the Court erred."

Milwaukee Nat'l. Bank vs. City Bank, supra.

In the same case it was contended that the City bank had no warehouse or other place of its own in which to store the wheat and that this was known to the Milwaukee bank, which must, therefore, have known that the City Bank would be compelled to store it with some one until the drafts which had some time to run should be paid. On the other hand it appeared that there were other elevators in Oswego not owned by Smith & Company ready to receive the wheat. To some of these it could have been delivered without danger of complicating the possession as bailee with possession under the claim of ownership; and the Court in that case further said:

"Was the City Bank acting with ordinary prudence to hazard the security which possession of the wheat gave, by delivering it to the very party to whom its principal had directed him not to deliver it?"

"In the foregoing case there was a plain course to be pursued which involved no difficulty or trouble, namely, storing the wheat in some other warehouse until A. F. Smith & Company, on payment of the acceptances, should call for it. This course would not have involved a departure from their instructions not to deliver to Smith & Company until the drafts were paid, and would have saved all parties from loss."

And further:

"Some question is made in the argument as to the effect of proceedings taken by plaintiff to recover

the wheat or its value of parties who bought or received it from A. F. Smith & Company. It is only necessary to say, if the jury shall be of the opinion that defendant was negligent in delivering the wheat to A. F. Smith & Company, it is responsible to plaintiff for the amount of the unpaid drafts, less any sum not actually recovered from others."

The evidence in this case shows that there were other warehouses at Port Arthur, upon the arrival of the Hyades flour in which it could have been stored by the Port Arthur Bank. But the present case is much stronger than the Milwaukee National Bank case above mentioned for the reason that in the former case the City Bank delivered the wheat to the elevator of Smith & Company, but in the present case the Port Arthur Bank, as the holder of the bills of lading, directed the delivery to Clarkson & Company, merchants, the very thing the instructions from The National Bank of Commerce forbade it to do. (Transcript p. 116).

The evidence of Short is very clear and explicit as to the execution and delivery to the Russo-Chinese Bank of the letter of guaranty or hypothecation.

"When we accepted this draft we gave a letter of guarantee to the Russo-Chinese Bank—that was a letter that the cargo was the property of the Russo-Chinese Bank until paid for." (Transcript p. 103). "That the letter of guaranty was to the effect we would sell the flour and deposit the money in the bank." (Transcript p. 104).

That when the letter of guaranty was executed the instructions were handed over to the shipping clerk in Clarkson's office and that Clarkson would immediately proceed to sell the old flour that was on hand before commencing the sale of the new. (Transcript p. 106). Short further testified that in all the course of dealing from the year 1900:

"We always gave the bank a letter of guaranty against—a letter of guaranty to take delivery of the cargo and the cargo belonged to them until it was paid for, and we sold it out and deposited the money in the bank from time to time as Clarkson & Company got it in."

He also testified that the bank knew of this and that the bank knew Clarkson & Company were in possession of the flour. (Transcript pp. 107-116). Also, that Clarkson & Company, not as agents for the steamship company, but as importers and merchants, made the arrangement with regard to the letter of guaranty with the Russo-Chinese Bank and that Clarkson & Company would never take delivery of the flour that had been consigned without first making arrangements with the bank for its release. That:

"As far as the liability of Clarkson & Company for delivering goods without a bill of lading, that was understood by both Davidson and myself, that if we delivered goods without the consent of the bank we were liable to a trip to Sagalin." (Penitentiary). (Transcript p. 121).

That he was perfectly willing to deliver the goods as the agent of the steamship company without the bill of lading, after making his arrangement with the bank for a letter of guaranty. (Transcript pp. 121-22-23).

Short also testified that he left the employment of Clarkson & Company about February 4th, 1904, and that there was then remaining in the warehouse about 34,000 sacks. (Transcript pp. 117-118).

Short's evidence conclusively establishes the fact that a part of the 36,000 sacks of flour covered by the bills of lading had been sold by Clarkson & Company in pursuance of the provisions of the letter of guaranty prior to the 4th of February, 1904. Davidson's testimony is substantially the same as Short's in regard to the letter of guaranty, although he called it a letter of hypothecation. (Transcript pp. 130-159).

Davidson testified:

"As soon as the draft reached the Russo-Chinese Bank it was customary for the Russo-Chinese Bank to inform Clarkson of its arrival and then this notification was given by a request from the bank that it should be accepted. The draft usually arrived some time before the goods and it was usual to accept it before the steamer carrying the goods had arrived in port. Upon the arrival in port of the steamer

carrying the goods some one in authority from Clarkson & Company would go to the Russo-Chinese Bank and make arrangements to get the documents attached to the draft upon acceptance of the draft and invariably this was accomplished. The Russo-Chinese Bank when surrendering documents before the draft was paid required that a letter of hypothecation should be signed by Clarkson & Company. I have no copy nor original of such letter, nor do I know where one can be found as all such letters were delivered to the bank—the Russo-Chinese Bank—at the time they were signed, but I do know that in substance these letters stated that the goods belonged to the Russo-Chinese Bank and that the consignee agreed to pay to the Russo-Chinese Bank the proceeds of all sales when made. On or about the 15th day of February, 1904, the Russo-Chinese Bank did consent to the sale of the flour ex Steamship "Hyades," if that is the name of the steamer that arrived at Port Arthur on or about the 8th of February, 1904." (Transcript p. 138).

There was some confusion in Davidson's testimony as to the date of the arrival of the flour, but he was not in doubt as to the quantity of flour securing the draft of December 11th, 1903. On page 141 of the Transcript he testified:

"Q. What was the quantity of flour shipped by this steamer for Clarkson & Company from the Centennial Mill Company?"

"A. Between thirty-five and forty thousand sacks."

This is the exact amount of the shipment by the Steamer Hyades. The Hyades arrived at Port Arth-

ur between the 23d and the 25th of January, 1904. The Pleiades arrived upon the 8th of February, 1904, but according to the testimony of Short only from 1500 to 2000 sacks were discharged from the Pleiades; the balance of the flour on the Pleiades was taken by the same steamer, which left Port Arthur February 17th, to Che Fu. (Transcript pp. 105-125).

Short's testimony clears up the confusion in the testimony of Davidson and shows that Davidson was mistaken as to the date of the arrival of the vessel. and Davidson himself says that he was not sure whether it was the Hyades or the Pleiades that brought the shipment in question, but he identified the steamer by the number of sacks of flour that were discharged. Besides, the discrepancy in Davidson's testimony was clearly challenged before the Court and the jury and the Court left it to the jury to determine to which vessel Davidson was referring. whether the Hyades or the Pleiades and the jury found properly that he was referring to the shipment by the Hyades, that arrived at Port Arthur between the 23d and 25th of January, 1904. (Transcript p. 142).

Again, Davidson testified as follows:

"Q. If you state there was such a custom requiring a written instrument to be executed by Clarkson & Company to the bank, state how long this custom had been in force, and whether the transaction covering the shipment of the Centennial Mill Company on the Hyades was covered by such custom? In other words, did Clarkson & Company execute such written instrument in case of the shipment in question as in other cases to which you have referred in your deposition?

A. To the best of my recollection this custom was instituted and inaugurated toward the end of the year 1901 or the beginning of 1902. It is impossible for me to state positively that the Russo-Chinese Bank required such an instrument for the shipment in question. All I can say is that it was the custom for the Russo-Chinese Bank to demand such an instrument for all shipments arriving under similar circumstances." (Transcript pp. 140-153-154).

(Short's testimony relating to the letter of guaranty will be found in the Transcript at pages 103-106-107-115-116-122-123).

Clarkson, a witness for plaintiff, testified as to his unwillingness to assume responsibility that would result from giving up goods without the bills of lading or a letter of guaranty backed by the bank, and stated that Clarkson & Company either paid the drafts before taking delivery of the flour as merchants or had made arrangements with the bank by which the bank would turn over the documents to Clarkson & Company. His testimony clearly cor-

roborates the testimony of Davidson and Short as to there having been established by the bank a practice permitting Clarkson & Company to take possession of the flour and sell the same prior to the payment of the draft, in disregard of the instructions of The National Bank of Commerce which were to the effect that the documents were to be surrendered only upon payment. (Transcript p. 82).

The evidence not only shows that in all cases is was the custom for the bank to surrender control of the flour to Clarkson & Company, merchants, before the payment of the draft, but further shows that in all cases the flour was sold by Clarkson & Company before the draft was paid; and in connection with the draft of December 11th, 1903 the evidence of Short and Davidson conclusively shows not only that the letter of guaranty was executed, permitting the sale of the flour, but that the flour was actually sold under the letter of guaranty, with the consent of the Russo-Chinese Bank. Short's testimony discloses that at least from two to four thousand sacks were sold prior to February 4th. Davidson testified that the particular flour securing the draft of December 11th, 1903 was actually sold to Ginsburg & Company with the knowledge, consent and approval of the plaintiff.

The value of the flour, according to Clarkson's testimony, before the commencement of hostilities between Russia and Japan, was 2.50 to 2.60 rubles per sack; after the commencement of hostilities 3 rubles per sack. It is true that Davidson says there was no market value for the flour, but his evidence shows that he sold the flour to Ginsburg at 2.40 rubles per sack.

The evidence of Short shows that the value of the flour at Port Arthur at the time in question was from 2.40 to 2.65 rubles per sack. Early in February the balance of the flour then remaining in Clarkson's warehouse was sold to one Ginsburg at 2.40 rubles per sack. An excellent summary of the evidence in the case regarding the payment of the original draft of December 11th, 1903 was made by the Circuit Court of Appeals in its opinion and for the convenience of this Court we quote the same:

"We find in the evidence of the defendant's witnesses Davidson and Short and in that of Clarkson, as well as in the circumstances of the case, much evidence upon which the special verdict might well have been based. The record shows that there had been many other similar drafts, accompanied by similar documents, sent by the Seattle Bank to the the Port Arthur Bank for flour sold by the Centennial Mill Company, and that the plaintiff bank was familiar with the business of Clarkson & Company, and indeed

was mainly instrumental in the establishment of that firm at Port Arthur. Clarkson & Company also had a place of business at Vladivostock, where its main office was; Davidson during most of the time in question being its manager at Port Arthur, and Short its assistant manager there, a Mr. Ofsiankin being during all of the times in question the manager of the plaintiff bank at Port Arthur, and, subsequently, and at the time of the taking of the testimony in this case being the manager of the Vladivostock branch of the plaintiff in error. The record shows that Clarkson & Company were the agents of the steamship company that carried the flour in question from Seattle to Port Arthur, and were also importers, merchants and insurance agents, and had one of the three warehouses at Port Arthur, all of which facts were well known to the Port Arthur bank. The flour in question was carried to Port Arthur by the ship "Hyades" which reached there about the middle of January, 1904. The evidence also shows that Clarkson & Company were large customers of the bank. The succeeding ship of the steamship company, also carrying flour among other things, reached Port Arthur about the 7th of February, 1904. Short testified, among other things that when the Hyades arrived with the 35,312 quarter sacks of flour in question there were but from 6,000 to 8,000 sacks in Clarkson & Company's warehouse, and that when that shipment arrived he went to the Port Arthur Bank on behalf of Clarkson & Company to accept the draft drawn for the purchase price of it, and did so; that when he accepted the draft Mr. Ofsiankin, on behalf of the bank, authorized Clarkson & Company to take immediate possession of the flour and sell it, and that he (Short) on behalf of that firm gave the bank what he designated as a 'letter of guaranty' and that Davidson in his deposition des-

ignates as one of 'hypothecation,' recognizing the flour as the property of the bank until paid for, and agreeing to pay over to the bank the proceeds thereof until full payment was made; that the letter was 'the regular form of bank guaranty,—it was a printed form' said the witness. And both Short and Davidson testified that what was done in the matter of the shipment here in question was in accordance with a long established custom between the Port Arthur Bank and Clarkson & Company. Short testified that:

"' From the year 1900 the same rule existed. We always gave the bank a letter of guaranty against —a letter of guaranty to take delivery of the cargo, and the cargo belonged to them until it was paid for, and we sold it out and deposited the money in the bank from time to time as Clarkson & Company got it in.'

"Davidson in his deposition corroborates the testimony of Short in that regard, and it is a most significant circumstance that, although it appears from the evidence that, during the times it was being taken Mr. Ofsiankin was the manager of the plaintiff in error's bank, he was not called to contradict the testimony of Short and Davidson; nor did the plaintiff in error produce the written agreement between the parties, delivered to the bank, according to the testimony of those witnesses, nor in any way account for it. Short testified that upon the acceptance by Clarkson & Company of the draft in question and the delivery by that firm to the Port Arthur Bank of the documents mentioned, Clarkson & Company took possession of the 35,312 quarter sacks of flour, and that they thereupon commenced selling it and paying into the bank the proceeds thereof, is a fair inference from his testimony as well as that of Davidson.

"It appears from the latter's testimony that by reason of orders of the Russian military authorities he was compelled to leave Port Arthur and did so on the 17th of February, 1904. Being asked on his direct examination when the last shipment of flour from the Centennial Mill Company arrived at Port Arthur, he answered that it arrived there about the 8th of February, 1904, but that he could not state positively, as he was not there at the time, and, being asked on what steamer that flour arrived at Port Arthur answered, 'On one of the steamers operated by the Boston Steamship Company or the Boston Towboat Company, either the Hyades or the Pleiades;' and being asked as to the quantity of flour that arrived by that steamer so referred to by him, answered, 'Between 35,000 and 40,000 sacks.' In his subsequent testimony, both on direct and cross examination the witness was evidently quite confident that the steamer that brought that flour was the Pleiades, but the flour itself the witness distinctly testified was sold by him before leaving Port Arthur to the firm of Ginsburg & Company, which he testified was a large Russian firm doing an extensive business with the Port Arthur Bank, and with its principal place of business at that place, and which sale he testified he had to make in order to protect Clarkson & Company against the war conditions then prevailing. His testimony is in part that he arranged with Ginsburg & Company to pay a part of the money for which he sold the flour into the Port Arthur Bank, and to take a draft from that company on Shanghai in his favor, which he intended to pay into Clarkston & Company's branch at that place, and that he took the head of the firm, Ginsburg, to the Port Arthur Bank and explained to the manager of that bank the terms of the sale to which he agreed.

"Short testified that the Pleiades arrived at Port

Arthur about the 7th of February, and that he himself left there on board of that vessel, and that not more than 1,500 or 2,000 sacks of flour were landed at Port Arthur from that ship, so that the jury might well have concluded that the 35,000 or 40,000 sacks of flour which Davidson thought were brought by the Pleiades was the consignment of flour which the Hyades carried to that port a few weeks before. As a matter of course that, and all other inconsistencies in the testimony of the various witnesses, as well as their veracity, were matters for the determination of the jury, in the light of all the facts and circumstances in the case. Moreover, there was testimony tending to show that from the 1st of January, 1904, to November 23d of the same year, Clarkson & Company paid into the Port Arthur Bank 126,928 rubles and 97 kopeks.

"We are of opinion that we would not be justified in holding that there was no evidence to sustain the special findings of the jury to the effect that the amount of the draft in question was paid to the Port Arthur Bank." (206 Fed., 651-3.)

We think the evidence conclusively shows that the Russo-Chinese Bank of Port Arthur held the legal title to the original draft of December 11th, 1903, and held the legal title to the bills of lading securing the same under instructions from The National Bank of Commerce not to deliver the bills of lading until the draft was paid; that the draft was accepted by Clarkson & Company about the 23d to the 25th of January, 1904; that at the time of the acceptance a letter of guaranty or hypothecation was taken by

the bank from Clarkson & Company; that by the terms of the letter of guaranty Clarkson agreed that the Russo-Chinese Bank became the owner of the flour until paid for, and Clarkson agreed to sell the flour and account to the Russo-Chinese Bank for the proceeds thereof. The actual ownership of the flour was, therefore, by this recognized by Clarkson to be in the bank. At the same time the Port Arthur branch gave directions to the Steamship Company to deliver the flour to Clarkson & Company, merchants, for the purpose of sale, thereby releasing the steamship company from any further liability in connection with the shipment. The legal effect was the same as though the Port Arthur Bank had surrendered the bills of lading to Clarkson & Company, merchants. This was the very thing it was forbidden to do by its letter of instructions from The National Bank of Commerce. These instructions provided that the documents should only be delivered upon payment, and under the instructions given by the Port Arthur branch to the steamship company to release the flour, Clarkson & Company took possession of the same and proceeded to sell it, and sold from 4,000 to 6,000 sacks prior to February 4th, 1904 and later sold the balance to Ginsburg with the affirmative knowledge and consent of the Port Arthur Bank.

By the actions of the plaintiff at Port Arthur the defendant was deprived of the flour and of the proceeds of the sale thereof, and the Port Arthur branch rendered itself liable to the defendant for the full value of the flour, which the jury must have found under the evidence at least equaled the amount of the draft. The defendant never received either the flour or the proceeds thereof on account of the draft of December 11th, 1903. Consequently when it paid the money for the recovery of which it is now suing on November 9th, 1904, it had received payment of the original draft from Clarkson & Company, or at least had rendered itself liable to the defendant by reason of its negligence in the handling of the shipment securing the draft in question, and the authorities we think abundantly support our contention.

Hobbs et al. vs. Chicago Packing Co., 98 Ga. 567, 25 S. E. 584, 58 Am. St. Rep. 320.

In this case the owner of goods shipped them upon a bill of lading whereby they were consigned to his own order, at the same time drawing in favor of a banking partnership "for collection" a draft upon the person to whom the goods were intended to be delivered upon payment of the draft, and also attaching to the draft the bill of lading so endorsed as to give the partnership control of the possession of

the goods. The draft and the bill of lading were delivered to the banking partnership with directions to deliver upon payment. The meats covered by the shipment were delivered to the party upon whom the draft was drawn upon the written request of the transportation company, signed by the bank, and it was held that the bank became liable for the value of the goods, and the Court said:

"A wrong delivery of goods, either negilgently or wilfully made, by one who had been entrusted with the custody of them, is in law a conversion by the latter. This rule has been applied to carriers of goods. In principle it is alike applicable to the defendants in the present case. There was ample evidence to warrant the jury in finding that the meat of the Chicago Packing and Provision Company was, by its indorsement of its bills of lading, in effect delivered to Hobbs & Tucker to be by them delivered to Ragan upon his paying for the same, and not otherwise. According to the verdict the defendants violated the trust reposed in them, and, this being so, they ought to make good the loss sustained by the plaintiff on account of their unauthorized and unlawful conduct."

In *Montague vs. Stelts et al.*, 37 S. C. 200, 15 S. 968, 34 Am. St. Rep. 736, the Court held that where a creditor received from his debtor as collateral securities, accounts due from a third person, in the absence of an agreement to the contrary, he is bound to use such diligence in their collection as he would exercise in relation to his own matters. The Court said:

"It seems to us, however, that the true rule is that, where the creditor receives from his debtor either notes or obligations of any kind of third persons, as collateral security for the payment of his debt, he cannot, in the absence of an express agreement to the contrary, maintain his action for the recovery of his debt without accounting for the collaterals by showing either that he has collected them and applied them as credits upon the debt, or that he could not, by the use of due diligence, collect them."

And further:

"When a creditor receives from his debtor notes or other securities as collaterals, he becomes a bailee of such securities and, as such, he is bound to use ordinary diligence, such as persons usually exercise in reference to their own matters, in endeavoring to collect such securities, unless there is an express agreement relieving him of such obligation, and here there is no evidence of any such agreement."

The pledgee received the collaterals as security for his debt and the Court held that the burden was upon him to account for them, and that no affirmative defense was necessary upon the part of the pledgor. And so in the case at bar; the Russo-Chinese Bank held the bills of lading and the flour as collateral and when the question was raised it was for the bank to show that it had not collected the proceeds of the sale of the flour or that it could not have done so by the exercise of due diligence. In this case the plaintiff did not show that it could not have col-

lected the proceeds of the sale of the flour by the exercise of due diligence, but, on the contrary, the evidence conclusively showed and the jury so found that as the holder of the bills of lading and the draft and as the legal owner of the same as against the world (except The National Bank of Commerce) it could have enforced the collection of the draft. It had the power to do so and rendered itself liable by failing to use due diligence in the preservation of the shipment. It not only did not use due diligence in attempting to protect the defendant upon its draft, but it affirmatively took such steps as rendered impossible its payment. It surrendered the securities to the very person to whom the defendant had forbidden it to deliver them, viz: Clarkson & Company.

"When the bill of lading is transferred and delivered as collateral security, the rights of the pledgee under it are the same as those of an actual purchaser, so far as the exercise of those rights are necessary to protect the holder."

Means vs. Bank of Randall, 146 U. S. 620, 36 L. Ed. 1107, 13 Sup Ct. Rep. 186.

Dows vs. Nat'l Exch. Bank, 91 U. S. 618, 23 L. Ed. 214.

"It is the duty of an agent who receives negotiable paper for collection, in case such paper is not paid, so to act as to secure and preserve the liability thereon of all the parties prior to his principal; and

if he fails in this duty, and thereby causes loss to his principal, he becomes liable for such loss. But this is not the utmost limit of the agent's duty and liability. He may so act as to charge all the parties to the paper and yet become liable for a loss occasioned by his negligence. The rule which will measure the diligence which is exacted of a holder of such paper, in order to charge the prior parties, will not always measure the diligence which is required of a collecting agency, in the discharge of his duty to his principal.

"Suppose an agent receives for collection from the payee a sight draft. No circumstances can make it his duty, in order to charge the drawer, to present it for payment until the next day. He has entered into no contract with the drawer, is not employed or paid by him to render him any service, and owes him no duty to protect him from loss. What is required to be done to charge the drawer is simply a compliance with the conditions attached to the draft, as if written therein; and that condition is in all cases complied with by presentation, demand and notice, on the next day after receipt of the draft. But suppose the agent, on the day he receives the draft, obtains reliable information that the drawee must fail the next day, and that the draft will not be paid unless immediately presented. What then is the duty he owes his principal, whose interests for a compensation he has agreed with proper diligence and skill to serve in and about the collection of the draft? Clearly all would say, to present the draft at once; and if he fails to do this, and loss ensues, he incurs responsibility to his principal; and yet the drawer would be charged if it was not presented until the next day.

"Where an agent receives a bill for collection, payable some days or months after date, in order to charge the drawer he need not present it for accept-

ance until it falls due; and if he then presents it and demands payment, and protests it and gives the notice, the drawer is held; and yet, in such a case, he owes his principal the duty to present the bill for acceptance at once, and if he fails in such duty, and loss ensues to his principal, he becomes liable for such loss."

First Nat'l Bank vs. Fourth Nat'l Bank, 77 N. Y. 320, 33 Am. Rep. 618.
1 Morse on Banking, 3d Ed., Sec. 219.

In the case of *Allen vs. Suydam*, (20 Wend. 321 32 Am. Dec. 555), the Court said:

"If the receiving a bill by an agent, to collect, implies an obligation on his part to take the necessary steps to charge the drawer and indorsers, by protest and notices, in case it is not accepted and paid by the drawee, I do not see why due diligence on the part of the agent, in procuring the acceptance of the drawee without delay, when it may be necessary or beneficial to the interests of the principal, should not also be implied, as it is the duty of a faithful agent to do for his principal whatever the principal himself would probably have done, if he were a discreet and prudent man. Even where the principal is habitually negligent in attending to his own interests, it forms no excuse for similar negligence on the part of his agent."

In the same cause Judge Verplanck said:

"It seems to be the general commercial law of the civilized world, that when a bill is payable at a day certain, the drawer and indorser are not discharged, if the bill is not presented until the day of payment. Yet it is still the duty of the agent for collection to present the bill for acceptance without

delay, and to give immediate notice of refusal to accept."

He further said:

"The principle is familiar that an agent for pay is bound to use such means, care, skill and precaution, as are adequate to the due execution of his trust. He must use the ordinary diligence of a skillful and prudent man in such affairs."

Allen vs. Suydam, supra.

Measured by the rule of law announced in the cases last cited, did the Russo-Chinese Bank exercise such diligence as to relieve it from liability to the defendant for its failure to collect the draft of December 11th, 1903? As the legal holder of the draft in question and bills of lading, it had full and complete power to have conserved the shipment of flour to the payment of the draft. It was the only one who had the right to receive the flour from the steamship company or to release the steamship company from the duty it had assumed upon the bills of lading. It could have taken possession of the flour and stored it in an independent warehouse of which there were two or three in addition to Clarkson's at Port Arthur at the time of the arrival of the flour. It did not exercise this power. It did not do the things that a reasonably prudent owner would have done under the circumstances. It failed to take the steps directed

by the defendant, not to deliver the flour except upon payment of the draft. It delivered the flour to Clarkson & Company in disregard of its instructions, thereby releasing the steamship company from liability. It permitted the sale of the flour by Clarkson & Company without applying the proceeds therefrom to the payment of the draft which the plaintiff held. Had the defendant been willing that Clarkson should have the custody and possession of the flour and power of sale prior to the payment of the draft, its instructions would have been different. The record shows that the Russo-Chinese Bank knew that Clarkson was the agent of the steamship company and the owner of the warehouse in which this flour was stored, and yet it affirmatively turned over the flour to Clarkson & Company with permission to sell the same; and the record clearly shows that it must have known that Clarkson was selling and disposing of the flour. It did not measure up to the rule requiring the agent to do whatever the principal himself would have done had he been upon the ground at the time.

But it will be contended in this connection that the letter of the defendant transmitting the draft of December 11th, 1903, contained no instructions in regard to the selling and storing of the flour (Transcript p. 32), and that the letter of January 22d,

1904, from the Russo-Chinese Bank to the defendant acknowledging receipt of the draft, contained a request on the margin of the letter for instructions as to the method of handling the shipment. (Transcript p. 90), and that in response to said letter of January 22d, 1904, the defendant gave no instructions.

This letter furnishes to the plaintiff no valid excuse for its action:

First, for the reason that the letter of guaranty was taken by the Russo-Chinese Bank at Port Arthur and the flour delivered to Clarkson & Company on the date of the deposit of the draft about January 25th, 1904. The bank at Port Arthur did not await instructions as to the handling of the shipment, but took it upon itself to have the flour delivered to Clarkson & Company on the date of the acceptance of the draft. It would have been useless for defendant to have given any instructions in response to the letter of January 22, 1904, because the Port Arthur Bank had already, long before the defendant could have received the letter, delivered the flour to Clarkson & Company and imposed the loss of the shipment upon the defendant. This Court will take judicial notice that the letter of January 22d, 1904, could not have been received in Seattle by the defendant prior to the date of acceptance of the draft and delivery of the

flour to Clarkson under the letter of guaranty, which was dated at the same time the draft was accepted.

Second: The third paragraph of the letter of January 22d, 1904, is as follows:

"Our bank does not guarantee that the goods be stored in due time when there is not storage accommodation obtainable, and takes no responsibility whatever if same are not landed in perfect condition, nor if the goods are deteriorating or becoming of lower value in consequence of price fluctuations while under our bank's control."

This provision requires a careful analysis. The bank says that it does not guarantee that the goods be stored in due time. That clause specifically expresses the particular instance in which the Russo-Chinese Bank will not guarantee the storage of the goods. The inference must follow that in all other cases the bank would store the goods. The bank impliedly undertakes that it will see to the storage of the goods; it only denies responsibility for failure to store when there are no storage accommodations, and the evidence shows that there were other independent warehouses at Port Arthur (Transcript pp. 111-121) at the time of the arrival of the flour in question and that the Russo-Chinese Bank knew of the goods and knew that Clarkson had them in his possession, and knew that he was the agent of the steamship company.

The letter further states that the bank will not be responsibile for deterioration or fluctuations in prices *while under the bank's control.* This clause expressly recognizes the fact that the goods themselves were under the bank's control. The Russo-Chinese Bank by the writing of that letter must be conclusively presumed to have intended to exercise physical control over the flour except in the specified cases above enumerated in said letter.

"When a person is intrusted with the care and custody of goods it is his duty to return them at the end of the bailment, or account for their loss and show that it happened without legal negligence upon his part. If he fails to do either, the presumption is that he has converted them, or that they have been lost through his negligence, and he is responsible for them."

Donlan vs. Clark, 23 Nev. 203, 45 Pac. 1.

But it will be contended that the Russo-Chinese Bank was acting in this case without compensation and that there is no evidence to show that there was compensation to be paid for its services in collecting the draft of December 11th, 1903.

"The taking by a bank from a customer in the usual course of business, of paper for collection, is sufficient evidence of a valuable consideration for the service. The general profits of the receiving bank from the business between the parties, and the

accommodation to the customer, must all be considered together, and form a consideration in the absence of any controlling facts to the contrary, so that the collection of the paper cannot be regarded as a gratuitous favor. The contract ther becomes one to perform certain duties necessary for the collection of the paper and the protection of the holder."

Exchange Nat'l. Bank vs. Third Nat'l. Bank, 112 U. S. 276, 28 L. Ed. 722, 5 Sup. Ct. Rep. 141.

"Sometimes banks charge a commission for collection where the business is required to be done in distant places. Some times they do it without charge, trusting to the indirect profits and advantages which may be expected to accrue by reason of the chance that the money may be left uncalled for during a few days following its actual receipt, and their consequent use of it for that time; or from the hope of attracting customers and increasing their business by offering such facilities without extra charges. These motives of self interest which must always be supposed to influence the bank when it consents to collect without direct compensation, are to be regarded as constituting a sufficient and valuable inducement for the undertaking to collect; and prevent the bank from availing itself of the plea that its contract was without consideration."

1 Morse on Banking, 3d Ed., Sec. 215.

"It is well settled that there is a distinction between the owner of a draft and his agent, in that, though the owner is not bound to present a draft payable at a day certain, for acceptance, before that day, the agent employed to collect the draft must act with

due diligence to have the draft accepted as well as paid, and has not the discretion and latitude of time given to the owner, and, for any unreasonable delay, is responsible for all damages sustained by the owner."

Exchange National Bank vs. Third National Bank, supra.

The defendant, in sending the draft to the plaintiff for collection, directed that the documents should be delivered upon payment. The authorities uniformly hold that a collection agent has no right to accept anything in payment except money. He cannot accept a check or draft or note, or any other substitute for money without rendering himself liable for any loss occasioned thereby.

"Where upon a sale of a bill of goods to the defendants, the plaintiff received from them for the price a draft, which the plaintiff presented to the drawee and took his check and gave up the draft, a delay of one day to present the check, during which time the drawee failed, was laches, and precluded the plaintiff from recovering the price of his goods from the defendants."

Smith vs. Miller, 43 N. Y. 171, 3 Am. Rep. 690.

The Court in the above case said:

"When a check is taken instead of money, by one acting for others, as was done by the plaintiffs, a delay of presentment for a day, or for any time be-

yond that within which with proper and reasonable diligence it can be presented, is at the peril of the party thus retaining the check and postponing presentment, as between him and the persons in interest, whom he represents."

In the case at bar the Russo-Chinese Bank caused the shipment of flour to be delivered to Clarkson & Company and accepted in payment thereof the written promise of Clarkson to sell the flour and account to the bank for the proceeds thereof. Suppose that instead of this letter of guaranty, the bank had taken Clarkson's note, payable 90 days after date, and surrendered the flour to him. Could it have been denied that the plaintiff had accepted in payment of the draft something other than money, and that the bank, under such circumstances unquestionably became liable for any loss sustained?

We do not think there can be any doubt under the law and the authorities that the Russo-Chinese Bank rendered itself liable to the defendant for the full amount of the draft, by reason of its wrongful and negligent acts in connection with the handling of the flour covered by the bills of lading, and in violating the instructions of the defendant, not to surrender the draft except upon payment. The shipment covered by the bill of lading consisted of about

36,000 sacks of flour. No witness testified that the value of this flour was less than 2 rubles per sack, and the maximum value was fixed at 3 rubles per sack. The bulk of the flour was sold at 2.40 rubles per sack to Ginsburg; that sold prior to the sale to Ginsburg was sold for from 2.40 to 2.65 rubles per sack, according to the testimony of Short. Assuming its value to be the lowest fixed by any witness: to be 2 rubles per sack, the total shipment would have amounted to 72,000 rubles, or practically $36,000, the amount of the draft. So that upon the uncontradicted testimony the value of the flour equalled the amount of the draft.

The plaintiff elected to take over this flour for its own use and benefit, and took a letter of hypothecation and guaranty, from Clarkson & Company agreeing to sell the flour and account for the proceeds. It accepted Clarkson's promise in lieu of the flour and that promise was in writing, which written promise the Russo-Chinese Bank has at all times retained in its possession. It did not turn the same over to the defendant.

By the wrongful acts of the plaintiff and by its negligence it has deprived the defendant of the flour, which at least equalled in value the amount of the

draft. The defendant at the time the shipment was made was unwilling to trust Clarkson, otherwise it would have directed the delivery of the documents upon acceptance. It refused to accept the individual and unsecured responsibility of Clarkson, and relied solely upon the collateral it had taken, of which the plaintiff deprived it.

And the defendant had good reason to refuse to rely upon the credit of Clarkson. Clarkson started in business in Port Arthur upon capital borrowed from the Russo-Chinese Bank and the evidence shows that he was heavily indebted to the bank at Port Arthur and at Vladivostock; that finally the Russo-Chinese Bank itself compromised a claim of about 900,000 rubles by accepting Clarkson's obligation for 231,000 rubles.

Moreover, the defendant in its letter of December 5th, 1904, acknowledging receipt of the amount which is now sought to be recovered, stated that it would repay the same to the Russo-Chinese Bank if the draft had not been paid by Clarkson & Company, and if unreasonable delay on the part of the plaintiff in returning the documents had not prevented it from recovering from the steamship company. The evidence shows that the bills of lading accompanying the

draft were never tendered or delivered to The National Bank of Commerce. They were sent to the Russo-Chinese Bank on June 14th, 1906, but there is no proof that they were ever delivered to the defendant, or ever tendered to it, except upon the demand that the sum in controversy should be paid by the defendant to the plaintiff. This was not a tender except upon a condition. And the Russo-Chinese Bank held the documents until the date of the trial and had possession of them at the trial and offered them in evidence in the case. But even if the documents had been delivered to the defendant, they would have been valueless for the reason that the plaintiff, while the holder of the documents, had directed the steamship Company to release the goods covered by the bills of lading. The steamship company was released from liability. Clarkson has always been insolvent and an action against him would have been useless. But the defendant was in no position to sue Clarkson. The evidence shows that it never received from the plaintiff the original draft which was accepted by Clarkson. The evidence of the plaintiff was to the effect that the draft had been mailed, but the evidence of the defendant was that it was not received, and the jury was justified in believing the

testimony of the defendant as against that of the plaintiff.

Moreover, where the negligence of the collecting agent has been established and loss has followed, the face of the draft is *prima facie* the measure of damages which the party interested therein has sustained and the burden is upon the collecting bank to show what the actual damage was, or to show that no damage has been actually suffered by him in defense of an action brought against it.

First Nat'l. Bank vs. Fourth Nat'l. Bank, 77 N. Y. 320, 33 Am. Rep. 618.
Second Nat'l. Bank vs. Bank of Alma, 138 S. W. 472, 99 Ark. 386.

But it will be contended that because the evidence discloses that Clarkson was still in business and a going concern he was presumed to be solvent and that the defendant might have recovered the value of the flour or the amount of the draft from him.

The evidence we think shows that the presumption of solvency has been overcome.

According to Davidson's testimony the firm of Clarkson & Company was established at the instigation and with the assistance of the Russo-Chinese Bank at Vladivostock in 1897, and that neither Clark-

son nor his partner put one cent of capital into the firm; that the bank gave Clarkson a credit of 1,000,000 rubles and that Clarkson & Company continued to owe the bank from 800,000 to 1,000,000 rubles for many years. (Transcript p. 136). And Clarkson, a witness for the plaintiff, testified that he claimed the bank owed him a half million rubles, and that the bank claimed Clarkson & Company owed it over 900,000 rubles; that the matter was finally compromised in May, 1908, by Clarkson & Company acknowledging a debt of 231,000 rubles. (Transcript p. 85). The fact that during all the years from 1904 to 1908, Clarkson & Company owed this vast sum of money to the bank and finally compromised it on a basis of about 25 cents on the dollar overcomes any presumption as to the ability of the defendant to have recovered this money from Clarkson, had it been its duty to do so.

"The assumption that the drawee was solvent is predicated upon the assumption that it was a 'going concern' and that every man or going concern is presumed to be solvent, nothing else appearing. But in this case something else does appear—indebtedness to an indefinite amount, lack of money on hand to pay, when presented, this small draft for a part of the debt of one creditor, and necessity of assignment within ten days thereafter. These were facts sufficient to rebut any presumption of solvency, had one

existed and to justify the finding of the Circuit Judge that the drawee was not a solvent firm, or, what is only necessary to be assumed to have been adjudged by him, that it was not shown by plaintiff that the firm was solvent by any facts overcoming the indications of insolvency which these afford. The *onus* was upon the plaintiff to show negligence of defendant, and loss resulting to itself in consequence."

Sahlien vs. Bank of Lonoke, 90 Tenn. 221, 16 S. W. 373.

"By the word 'insolvency' is meant a general inability to pay one's debts, and of this inability the failure to pay one's just and admitted debts would probably be sufficient evidence."

2 Benjamin on Sales (4th Am. Ed.), Sec. 1243.

Clarkson is shown by the record to have owed nearly a million rubles, and that he settled that obligation upon less than a 25 per cent. basis, giving his notes for the amount which he agreed to pay. The testimony further shows that Clarkson was not paying his obligations in the ordinary course of business, which in itself overcomes the presumption that he was solvent. But even if Clarkson were solvent, we do not think this will avail the plaintiff anything

for the reasons we have stated. The plaintiff took over a valuable cargo of flour, worth the amount of the draft and it cannot be heard to say that this valuable shipment of flour has disappeared and that it cannot be held liable for the loss sustained by the defendant until it has been shown that Clarkson could not have been compelled to pay the same. And further, the plaintiff under its letter of guaranty and under Clarkson's promise to pay therein contained, could have sued Clarkson in its own name and collected the money from him, had he been solvent.

The evidence is undisputed that the defendant never received anything from Clarkson & Company.

Payment by the Centennial Mill Company to the National Bank of Commerce of the Amount of the Original Draft Sent to the Russo-Chinese Bank for Collection in no Way Relieved the Plaintiff for Its Wrongful Acts and Negligence in the Performance of Its Duty as Collection Agent for the Draft. Plaintiff Owed to the Beneficial Owner of the Draft the Duty of Acting in Good Faith and With Diligence.

But it will be contended that the Centennial Mill Company paid The National Bank of Commerce the

amount of the original draft, and that The National Bank of Commerce, when it received the remittance sued for in this action in December, 1904, paid the same over to the mill company and was in no wise interested in the transaction and could not defend the action brought against it. And it will further be contended that the Centennial Mill Company is the real party in interest and if anyone has a claim it is the Centennial Mill Company and not The National Bank of Commerce. Section 180, I Rem. & Bal. Code (Wash.), provides as follows:

"An executor or administrator or guardian of a minor or person of unsound mind, a trustee of an express trust, or a person authorized by statute, may sue without joining the person for whose benefit the suit is prosecuted. A trustee of an express trust, within the meaning of this section, shall be construed to include a person with whom or in whose name a contract is made for the benefit of another."

The Centennial Mill Company vested in The National Bank of Commerce the legal title to the draft, the documents and the shipment itself and it undertook to carry out the business of the Mill Company in the collection of the draft and in the handling of the whole transaction. It was acting as a trustee or agent for the mill company, and under the statute it seems to us to be the only person who could have maintained an action for the damages in question.

It is possible that, as The National Bank of Commerce was acting as the trustee or agent of the mill company, any defense the Port Arthur Bank might have had against the mill company could have been asserted against the defendant. But there is no such question involved in this case. If this be true, then the converse ought to follow — that The National Bank of Commerce, acting for the Centennial Mill Company, ought to be permitted to set up any defense against the Port Arthur Bank which the Centennial Mill Company might have interposed. The case of *Second National Bank vs. Bank of Alma*, 99 Ark. 386, 138 S. W. 472, upholds the right of the defendant to interpose any defense that was available to the mill company.

The real beneficial owner of the flour was of course the Centennial Mill Company. The National Bank of Commerce was its agent. The defendant bank undertook to handle the shipment as the agent of the Centennial Mill Company. The fact that the mill company might not be able to proceed against the Seattle bank for the negligence of the Port Arthur Bank affords no reason for holding that the Seattle bank, the agent of the mill company, cannot avail itself of the defense of negligence on the part of the

Port Arthur Bank in protecting the interests of the mill company. The trustee of an express trust ought to be permitted to avail itself of any defenses that are available to the beneficiaries under the trust. Assuming that the original draft was in fact paid by Clarkson & Company to the Port Arthur Bank and that it has wrongfully retained such money, and had it in its possession at the time the remittances were made by it to the Seattle bank, even under such circumstances, if counsel's contention is correct, The National Bank of Commerce could not interpose such defense, because the Centennial Mill Company had relieved The National Bank of Commerce of liability for the wrongful or negligent acts of the Port Arthur branch. Such a holding would seem to be most unreasonable and unjust.

"A trustee may set up in his character as trustee any defense which the *cestuis que trustent*, were they in person defending the action, might urge in their own behalf."

Wagnon vs. Pease, 104 Ga. 417, 30 S. E. 895.

But the Port Arthur Bank in assuming to make the collection of the draft of December 11th, 1903, was acting for the real and beneficial owner of the draft, no matter who that owner might be.

"The deposit in one bank of a bill to be transmitted to another for collection, is a common usage of great public convenience, the effect of which is well understood, and the duty of a bank receiving such a bill is precisely the same, whoever may be the owner thereof; and if it was unwilling to undertake the collection, without precise information on the subject, the duty ought to have been declined."

Bank of Washington vs. Triplett, 1 Peters 25, 7 L. Ed. 37.
Diamond Mill Company vs. Nat'l Bank, 9 Tex. Civ. App. 31, 29 S. W. 169.
Exchange Nat'l. Bank vs. Third Nat'l. Bank, 112 U. S. 276, 28 L. Ed. 722, Sup. Ct. Rep. 141.

"In case of any default on the part of any bank engaged in conducting the collection, whereby it would ordinarily lay itself open to a suit by the party who deposited the paper for collection, suit may also be brought, instead, by any real party in interest, though his name was not mentioned and the fact of his interest was entirely unknown to the bank at the time of its receiving the paper. The naked fact that such person had a real beneficial interest in having the bank do its duty in the premises, and must therefore be an actual loser in some shape by its failure to do so, gives the right of action."

1 Morse on Banking, 3rd Ed., Sec. 251.
McKinster vs. Bank of Utica, 9 Wend. 46.

It was not the sole duty of the Russo-Chinese Bank to charge the Centennial Mill Company with liability upon the draft. It was its duty to do what-

ever a reasonably prudent principal would do in making the collection. It was just as much the duty of the Port Arthur Bank to use diligence in the collection of the draft whether it was in fact owned by the Centennial Mill Company or by The National Bank of Commerce, and it is wholly immaterial whether or not the Centennial Mill Company reimbursed The National Bank of Commerce for the amount of its advance at the time it discounted the draft.

Ginsburg Transaction:

It will be contended, however, that when Ginsburg paid the 67,000 roubles on April 30th, 1904, for the flour purchased by him from Clarkson & Company the Russo-Chinese Bank remitted about 42,000 rubles of this money to The National Bank of Commerce in payment of two certain drafts, one for $4,-136 and the other for $16,155. These two drafts were similar to the one in controversy and represented the purchase price of two shipments of flour made by the Centennial Mill Company to Clarkson & Company. The drafts were drawn for the amount of the shipment with bills of lading and documents endorsed and attached as in the case of the draft for $36,194.80. The witness Short, testified that the

same arrangement as to the letter of guaranty and the taking over of the flour by the Russo-Chinese Bank and the sale of the same by Clarkson & Company under a promise to account for the proceeds of the sale of such flour to the Russo-Chinese Bank, was made as in the case of the Hyades flour and in the case of the draft of December 11th, 1904. It is manifest that at the time the Russo-Chinese Bank paid the two drafts one for $4,136, and the other for $16,155 respectively on the 30th day of April, 1904, it was already liable for the amount of these drafts to The National Bank of Commerce. Contrary to instructions, they had taken a letter of guaranty from Clarkson & Company and consented to the release of the flour from the Steamship Company and consented affirmatively to its being taken over and sold by Clarkson & Company, and if the Port Arthur Bank did pay these drafts out of the proceeds of the sale of the flour to Ginsburg, it was paying its own obligation out of the money realized from the sale of flour pledged for the payment of the $36,194.80 draft. Consequently it is immaterial whether The National Bank of Commerce received the money from Ginsburg or whether it did not. In paying over the money for the amount of

these two drafts the Port Arthur Bank was paying its own individual indebtedness to The National Bank of Commerce which it had become obligated to pay by reason of its taking the letter of guaranty from Clarkson & Company at the time of the arrival of the shipment securing the two drafts, and the testimony of Short in regard to the arrangement as to the letter of guaranty is corroborated by the testimony of Davidson and the testimony of Clarkson. Clarkson testified that he had given instructions to his manager at Port Arthur never to take any goods out of the warehouse which had been brought over by steamer unless the bills of lading were produced or unless his manager procured permission from the bank and had made satisfactory arrangements with the bank for the release of the goods.

The testimony of Short is very clear and explicit in regard to the drafts of $4,136 and $16,155. He stated that the same arrangement as to the letter of guaranty was made; that the steamship company was directed to release the goods, and that the flour securing these two drafts was taken over by Clarkson & Company and sold in the ordinary course of business and that the entire proceeds were deposited with the Russo-Chinese Bank. (Transcript pp. 109-110).

The evidence is even clearer as to these two than as to the draft of December 11th, 1903.

At the time the shipment was made with reference to the two drafts, Short was one of the managers of Clarkson & Company and had personal knowledge of the sale of the flour and deposit of the money with the Port Arthur Bank. The record also shows that The National Bank of Commerce at the time it received payment of the two drafts in question had no knowledge whatever of the source from which the money came and the course of dealing by the Russo-Chinese Bank strongly supports the contention of the defendant with reference to their method of handling the draft of December 11th, 1903.

The Port Arthur Bank by its negligent and wrongful method of handling the collections in question and in disregarding its positive instructions from The National Bank of Commerce, became liable to the defendant for the amount of the remittances which it is seeking to recover in this case, whether the action be viewed as one upon an express contract for the repayment of money or upon one for the recovery of money paid under a mistake of fact.

The Port Arthur Bank, by its negligent conduct and disregard of instructions was indebted to the de-

fendant at the time the remittances were made in the amount thereof and the jury in rendering its special verdict was fully justified in so finding and there was abundant evidence to support the finding that the draft was paid prior to the remittances.

Plaintiff's Brief.

Heretofore and up to this point we have attempted to present our argument in support of the judgment of the lower Court independently of the contentions made by counsel for the Russo-Chinese Bank. In fact, up to this point our argument was prepared before we had an opportunity to examine the brief of the plaintiff. We shall now take up the brief of plaintiff and consider its argument, insofar as we have not already anticipated and covered it, and shall attempt to follow the argument of counsel in the order stated by him, and will consider the first instruction criticised by counsel, found on page 14 of his brief, which is as follows:

"If you find from the evidence in this case that plaintiff permitted Clarkson & Company to take over the flour under such an arrangement as the defendant claims with the stipulation that the plaintiff was the owner of the flour and with the agreement that Clarkson & Company would account to the plaintiff for the proceeds of the sale of the flour, then I instruct you that such action on the part of the plaintiff constitutes in law a payment of the draft in question

and the plaintiff cannot recover and your verdict must be for the defendant."

Counsel for plaintiff has selected only a portion of the instruction of the trial Court relating to the subject of payment. He has separated the language quoted from the context and based his entire argument upon the isolated extract from the instruction, and his position is untenable, first,—for the reason that the entire instruction of the Court relating to the same subject, delivered by the Court in regular order correctly states the law; and second,—even if the instruction be considered by this Court independent of the context and of the other propositions stated by the Court, it is a correct statement of the law applicable to the established and undisputed facts shown by the record in this case. The entire instruction relating to the subject of payment is as follows:

"It is contended by the defendant in this case that upon the arrival of the draft and the documents attached thereto and the flour at Port Arthur, about the middle of January, 1904, the plaintiff entered into an arrangement or agreement with Clarkson & Company by the terms of which the plaintiff consented to and permitted Clarkson & Company to take possession of the flour in question and consented that the flour be sold by Clarkson & Company to third parties in open market, and that as a part of such agreement or arrangement between the plaintiff and Clarkson & Company the bank required Clarkson & Company to give to the plaintiff a letter of guaranty, which pro-

vided that Clarkson & Company recognized the ownership of the flour by the plaintiff and stipulated that the plaintiff was the owner of the flour in question, and Clarkson & Company upon their part agreed to sell the flour and account to the plaintiff for the proceeds thereof.

"If you find from the evidence in this case that plaintiff permitted Clarkson & Company to take over the flour under such an arrangement as the defendant claims with the stipulation that the plaintiff was the owner of the flour and with the agreement that Clarkson & Company would account to the plaintiff for the proceeds of the sale of the flour, then I instruct you that such action on the part of the plaintiff constitutes in law a payment of the draft in question and the plaintiff cannot recover and your verdict must be for the defendant.

"It is a general rule of law that where collateral security is received for a debt with power to convert the security into money, this is specifically applicable to the payment of such debt; the same person being the party to pay and receive, no act is necessary and the law makes the application. If the proceeds equal or exceed the amount of the debt it is *de facto* paid; no action would lie for it, and proof of these facts would support the defense of payment. And if you find from the evidence in this case that the plaintiff did consent to Clarkson taking over the flour in question and consented to the sale by Clarkson & Company, and then Clarkson & Company sold the flour in question and paid over the proceeds thereof to the plaintiff, then such payment of the proceeds of the sale of such flour to the plaintiff operated as a payment of the draft in question—provided the proceeds of the sale of the flour equaled the amount of the draft; and if such proceeds did not equal or exceed the amount of the debt then it was a payment *pro tanto* —that is a payment of so much of the said draft as the

proceeds of the sale of the flour would pay of the same. and this is the law notwithstanding the fact that plaintiff may have received the proceeds of the sale of said flour and placed the same to the credit of Clarkson & Company in its bank and permitted Clarkson & Company to use said funds for other purposes." (Transcript pp. 170-171).

The Russo-Chinese Bank held the legal title to the draft and to the bill of lading, as well as to the flour covered by it. It was acting as the collection agent of The National Bank of Commerce or the beneficial owner of the draft and the flour. It was instructed to deliver the bill of lading to Clarkson & Company only upon payment of the draft. As the holder of the legal title it was within the power of the Port Arthur Bank to control the possession of the flour. It had the power to store the flour in an independent warehouse, of which there were two or three at Port Arthur. It was of course not the equitable owner of the flour; but it was the owner of the flour as against every one except The National Bank of Commerce, or the real owner of the bill of lading. It caused the draft to be accepted by Clarkson & Company and simultaneously and without the consent of the defendant authorized the steamship company to surrender the flour to Clarkson & Company, merchants, contrary to its instructions. It then required Clarkson & Company to enter into a letter of guar-

anty or hypothecation with it by the terms of which it was agreed between Clarkson and the Port Arthur Bank that the real ownership of the flour was vested in the Port Arthur Bank, but permitted Clarkson & Company to take over the flour and to sell the same under an agreement by which Clarkson was to account to the Port Arthur Bank for the proceeds of the sale of the flour. The shipment consisted of about 36,000 sacks of flour, the value of which, according to the undisputed testimony, was at least two rubles per sack. The total value of the flour equaled the amount of the draft. The freight, insurance and warehouse charges upon the shipment were evidently paid by Clarkson & Company, because there is nothing in the record to show that any money was advanced by either the plaintiff or the defendant for that purpose and no reference to the freight or other charges appears anywhere in the record. The Port Arthur Bank did not have the right to appropriate the flour to its own use or to sell the same to itself, but it had the power to do so as against everybody except The National Bank of Commerce, the beneficial owner of the draft.

The uncontradicted evidence is that the Port Arthur Bank did take over the flour under the letter of

guaranty or hypothecation. It undertook to act as the real owner of the flour in its dealings with Clarkson; it appropriated the flour to itself and permitted Clarkson to sell it, and the evidence is undisputed that the flour was sold to Ginsburg at 2.40 rubles per sack, with the knowledge, consent and active participation of the Port Arthur Bank, and the proceeds of the sale of the flour were, without dispute, paid over to the Russo-Chinese Bank, and it does not dispute that it received the proceeds of the sale of the flour but contends that it did not have the power to dispose of these proceeds except under the direction of Clarkson.

This contention is contrary to the documentary evidence in the case. The Port Arthur Bank was clothed with the power to take possession of, control and hold both the flour and the proceeds of the sale thereof. The acts of the Port Arthur Bank amounted to a conversion of the shipment of flour by the Port Arthur Bank. If Clarkson misappropriated the proceeds of the sale of the flour, he did so with the permission of the Port Arthur Bank. The bank constituted Clarkson its agent to sell and dispose of the flour. By assuming ownership of the flour and permitting Clarkson to take it and sell it it made Clark-

son its agent and is responsible to the beneficial owner for any loss sustained by that owner.

Counsel for plaintiff seems to concede that the instruction criticised would be unobjectionable had it contained the condition or element that to constitute payment of the draft the flour delivered must be of equal value to the face of the draft, for upon page 40 of his brief he says:

"For it is to be duly noted that the instruction does not even contain the condition or element that to constitute payment of the draft the flour delivered must be of a value equal to the face of the draft."

The record clearly discloses, as we have heretofore shown by references to the testimony, that the value of the flour was at least 2 roubles per sack. In fact, the undisputed evidence of Davidson, as well as Clarkson, is that the particular flour securing the draft of December 11th, 1903, was sold for 2.40 rubles per sack. The trial Court would have been fully warranted in instructing the jury that it was an established fact in the case that the value of the flour was at least 2 rubles per sack, and he would have been well within the facts had he told the jury that the flour was of a value of 2.40 rubles per sack, basing his instruction upon the undisputed testimony of both Clarkson and Davidson, to which we have in our

brief heretofore referred. The fact having been clearly established by the undisputed testimony that the flour was worth at least 2 rubles or 2.40 rubles per sack, it necessarily follows that the instruction given was not erroneous. Why the necessity for incorporating in the instruction the condition or element that to constitute payment of the draft the flour delivered must be of a value equal to the face of the draft? There was no occasion for the Court to advise the jury that the value of the flour must be equal to the face of the draft. The instruction was given in the light of the evidence as it existed at the time the instruction was given. The Court might, with entire propriety, have prefaced the instruction with the statement that there was no dispute as to the value of the flour, but what the Court did do was in effect the same thing.

Upon page 37 of plaintiff's brief it is said:

"If we assume that the Port Arthur branch did, contrary to its instructions, permit Clarkson to take over the flour, then to the extent of the value of the security that was thereby released it may have been responsible. There might have been a conversion so far as the released flour was concerned, but this conversion could not extend further than the amount and value of the flour so released."

Commercial Bank vs. First State Bank, 153 S. W. (Tex.) 1175.

If a pledgee converts collateral to his own use, it may operate as a payment of the claim *to the extent of the value of the converted collateral, but no further.*"

2 Randolph on Commercial Paper, Sec. 795.
Alden vs. Camden Anchor-Rockland Machine Co., 107 Me. 508, 78 Atl. 977.
Hunt vs. Nevers, 15 Pick. 500, 26 Am. Dec. 616.

As it cannot be contended by counsel that there was any dispute in the testimony as to the value of the flour at least equaling the face of the draft, then it must be apparent that there was no error in the instruction. In fact, as there was no dispute in the testimony as to the value of the flour equaling the face of the draft and no dispute as to the execution of the letter of guaranty and the creation of the agreement therein set forth, and no dispute as to the fact that the Port Arthur Bank took over the flour and permitted Clarkston to sell it, and that he did sell it for more than enough to pay the draft, it became the duty of the Court to have instructed the jury to find for the defendant, had he been requested to give such instruction.

Counsel seems to concede and the authorities which he cites hold that if the value of the collateral converted equals the amount of the draft the col-

lecting agent who converts the collateral becomes liable to the real owner for the full amount of the draft.

Such are the facts in this case and the defendant was entitled to an instruction to the jury to the effect that the draft had in fact been paid prior to the remittances made in November and December, 1904, which are sought to be recovered in this action.

Counsel evidently realized the danger of his position and he now undertakes to show that there was a dispute in the testimony as to the value of the flour, because upon page 39 of his brief he quotes from the testimony of Davidson (Transcript p. 151) that "There was no market price for flour at that time."

It was not the market value with which the jury or the trial Court was concerned. It was the value of the flour. Davidson's testimony, which we have heretofore quoted, discloses that he sold the flour at what he considered it worth under the circumstances and that its value under the circumstances existing at Port Arthur at the time was 2.40 rubles per sack, which was the price at which he sold it. Davidson's testimony upon this point is entirely consistent with itself and with the other testimony in the case.

Upon page 40 of his brief he says:

"It seems obvious that the respondent, in order to uphold this instruction, must take one of the two horns of a dilemma. It must either claim that the obligation of the draft was completely extinguished when the letter of guaranty was given (in other words, a novation), or that it is the law that whenever a collecting bank releases security under such circumstances, it becomes at once *ipso facto* and at once liable for the full face amount of the draft, regardless of the value of the security so released."

We are not obliged to accept either horn of the dilemma, as counsel expresses it. The instruction taken as a whole, clearly shows that the Court did instruct the jury that payment by the conversion of the collateral extended only to the value of the security released, and if the security converted was less than the amount of the draft the conversion amounted to a payment *pro tanto*. Again, as we have seen, there was no dispute as to the value of the flour equaling the amount of the draft in the case at bar.

Neither are we compelled to accept the proposition that there was a novation growing out of the acts of the Port Arthur Bank in handling the collection in question. It is true that Clarkson & Company accepted the draft. Its acceptance obligated Clarkson & Company to pay the draft at maturity; but

at the same time the Port Arthur Bank required the execution of a letter of guaranty by which the bank itself took over the ownership of the flour, as between it and Clarkson, and permitted Clarkson to sell the same and to deprive the defendant of its collateral. The guaranty agreement, followed by the taking over of the flour, operated as payment so far as The National Bank of Commerce was concerned. The Port Arthur Bank by releasing the security and depriving the defendant of its value rendered itself liable to the defendant for the full value of the flour, which in this case happened to be the full face of the draft.

The liability of the Port Arthur Bank to the defendant arose out of its negligent handling of the security, and it became liable to the defendant for the value of the flour, even though Clarkson might have remained liable upon his acceptance for any difference between the value of the flour and the amount of the draft, if the value of the flour were in fact less than the amount of the draft.

It would be a strange doctrine for this Court to announce that a collection agent who has undertaken to collect a draft secured by a bill of lading for flour and charged with the duty of using due diligence

in making such collection, could escape liability for a conversion of the flour, because at the same time it converted the flour it also took an acceptance of the draft from Clarkson & Company. Any collection agent under the same circumstances could freely convert collateral to its own use or allow it to be dissipated through its negligence, and escape liability by taking an acceptance from the consignee, if the law is as counsel contends.

It is contended by the defendant that if the flour was misappropriated by Clarkson it was due to the negligence of the plaintiff, for which negligence the plaintiff became liable to the defendant for the full value of the flour, and that this obligation existed at the time of the remittance made in November and December, 1904, for the recovery of which this action is brought; and if this liability on the part of the plaintiff to the defendant existed at that time, the plaintiff cannot recover the money claimed because it was the duty of the plaintiff to have paid the money to the defendant as it did do in making the remittance, whether the action be predicated upon an express contract to repay money or upon a claim for money paid under a mistake of fact.

If the plaintiff through its negligent acts, either of omission or of commission, caused the defendant to lose the value of the flour, which equaled the face of the draft, it was legally bound to pay the amount of the draft to the defendant. It was not paid under a mistake of fact, neither would there be any consideration for the promise of the defendant to refund the money, for the reason that the Port Arthur Bank only did its duty when it made the remittances in November and December, 1904. It was paying its own debt or obligation which it incurred through its negligence. There could certainly be no consideration for any promise of the defendant to pay back the money upon any theory of the case.

The instruction criticised was, we think, unobjectionable when read in connection with the context of the entire instruction on the subject of payment. But even if it were erroneous standing alone as a general proposition of law it certainly is not erroneous when the uncontradicted evidence shows that there was no dispute as the value of the flour equaling the face of the draft. But even if as an independent proposition of law it should be held to be erroneous still in view of the established fact that the value of the flour equaled the face of the draft, the error, if one at all, was certainly harmless.

II.

The plaintiff next contends: "That there was error in the instruction to the jury to the effect that the collecting bank became invested with the title to and ownership of the flour and was obligated to account for the amount of the draft, and could not be excused from the obligation so to account by saying that the flour disappeared without its knowledge. In this connection is discussed the refusal of the Court to charge that the duty of the collecting bank was one of an agent." (Brief, p. 46.)

Under the above heading counsel refers to his second specification of error (Brief p. 11). The instruction in full is quoted in the specification of error, but we desire to call the attention of the Court to the fact that counsel did not except to the entire instruction, but only to that portion to the effect that the defendant bank became invested, by virtue of the transfer to it of the documents, with the legal title to the flour. The exception taken by counsel is as follows:

"We except to the giving of the instruction to the effect that the defendant bank became invested by virtue of the transfer to it of the documents with the legal title to the flour; and also to the instruction and to each and every part thereof to the effect that by the endorsement and transfer of those documents the plaintiff bank became invested with the legal title to the flour." (Transcript p. 173).

Counsel contends that by the giving of this instruction the Court undertook to determine the relative rights of the parties of this action upon the theory that the relationship between them was one of vendor and vendee instead of principal and agent. We contend that the instruction itself negatives this contention. The instruction expressly states that the Russo-Chinese Bank "became invested with the title as to all the world *except The National Bank of Commerce*, and had the legal right to sell and dispose of the flour and to receive the proceeds, subject to its duty as an agent to account to The National Bank of Commerce for it."

This proposition of law was based upon the provision of the statutes of the State of Washington making a bill of lading properly endorsed and delivered a negotiable instrument, and making the delivery of the bill of lading the symbolical delivery of the flour; and this is the general rule of law as established in the cases to which we have heretofore referred. The Court refers to the legal title to the flour, but the entire instruction shows that the Court recognized the relation existing between the plaintiff and defendant as that of principal and agent; but stated to the jury that as to all of the

world, except The National Bank of Commerce the Russo-Chinese Bank was the owner of the bill of lading and the flour itself; and it was necessary for the Court to give such instruction in view of the evidence and testimony that had been introduced in the case.

It was the contention of the plaintiff that the Steamship company was liable for the loss of this flour, but the evidence shows that the bank, the holder of the legal title to the bill of lading and the flour, consented that the Steamship Company, through its agent, Clarkson & Company, deliver over the flour to Clarkson & Company, Merchants, for sale, under the promise of Clarkson & Company to account to the bank for the proceeds. The Steamship Company was perfectly justified in accepting the authority of the Russo-Chinese Bank to release the flour, because only the holder of the bill of lading had the power to release the shipment. It seems to us that counsel has misunderstood and misinterpreted the purport and effect of the instruction of the Court upon this question. The entire instruction must be read and construed together, and in the latter part of the instruction the Court expressly stated that: "As agent for the owner it was obli-

gated to account for the amount of the draft, to account for the security which the bill of lading constituted, and it cannot be excused from obligation to account by saying that the flour disappeared without its knowledge." And the Court further said:

"By virtue of these endorsements and transfers the *legal* title to the draft and documents and to the flour in question passed to and became vested in the Russo-Chinese Bank, and I instruct you that *as a matter of law it was in the power of the plaintiff to handle, control, sell and dispose of such flour as its own.*"

The Russo-Chinese Bank was clothed with the legal title and all the evidences of ownership and was in possession of the documents, and as against everybody except The National Bank of Commerce, it had the power to handle the flour as its own property and had the power to direct the Steamship Company to release the flour to Clarkson & Company. And in view of the fact that there was evidence introduced in the case showing that the bank had taken the flour over for itself and had exercised acts of ownership over it and had caused it to be released by the Steamship Company, and had permitted it to be sold and had participated in its sale, the instruction must be held to have been a proper exposition of the law as applied to the issues and the testimony in this case.

As between The National Bank of Commerce and the Russo-Chinese Bank the relationship of principal and agent continued to exist so far as the equitable title and the real ownership of the draft and the security were concerned, and we have no criticism to make of the language of the Court in *Second National Bank v. Bank of Alma*, 99 Ark. 386, 138 S. W. 472, where the Court said:

"By accepting for collection the draft accompanied by the bill of lading the plaintiff only became the agent of the Judge Machine Company for that purpose and it did not thereby become the true owner of the draft or of the machine which was covered by the bill of lading accompanying the draft."

This in effect is what the trial court stated in this case; that the relation of principal and agent existed between the two banks, but that the legal title to the bill of lading and the flour was vested in the Russo-Chinese Bank.

In the Bank of Alma case the Court said:

"The collecting bank had the right to sue in its own name for any default of the defendant by reason of which any liability was incurred by it to the Judge Machine Company, and it also had the right to institute suit against the defendant for any loss which it caused by reason of a breach of duty committed by it in collecting the draft because the title thereto had been actually transferred to it, although for collection, by the Judge Machine Company."

Counsel also seems to rely on the case of *National Bank v. Merchants Bank,* 91 U. S. 92, 23 L. Ed. 208, in support of his contention that collecting banks do not acquire title to documents or the property represented thereby, sent them for collection. The case only refers to the real ownership and not to the legal title. Counsel seems to rely with great confidence upon the language of this Court in that case.

In the case at bar the draft was drawn upon Clarkson & Company with documents attached to be delivered only upon payment; in that case a time draft was drawn against a consignment "*for collection.*" In this case the draft was drawn with documents attached to be delivered only *upon payment.* In that case the drafts were deposited in the bank for collection and there were no instructions by the forwarding bank as to what should be done with them during the time intervening between the acceptance of the drafts and the date of payment. The Court held that in the absence of specific instructions the collecting bank was justified in surrendering the bill of lading at the time the draft was accepted. The Court in that case clearly indicated that if the bill of lading was not intended to be delivered up upon acceptance some words should

have been used to indicate the agreement of the parties; that in the absence of such agreement it was the duty of the collecting bank to deliver the documents upon the acceptance of the draft.

But in the case at bar the Russo-Chinese Bank was expressly notified not to deliver the bill of lading until the draft was paid and the evidence showed and the jury found that the Russo-Chinese Bank did in effect deliver the document, and did in effect deliver the flour by advising the Steamship Company to turn over the flour to Clarkson & Company, Importers, and by taking a letter of guaranty, and by requiring an agreement on the part of Clarkson & Company to account to it for the proceeds of the sale of the flour and by consenting affirmatively to its sale and participating in that sale and receiving the proceeds thereof. The distinction between that case and the case at bar is fundamental. The questions involved and all the circumstances and surroundings were entirely different. And in the case of *National Bank v. Merchants Bank* the Court further says: That the drawer of the draft and the drawee could have made an agreement had they seen fit with reference to the transaction, and in the case at bar an agreement was made that the bill of lading

and the flour were not to be delivered until payment.

And in *National Bank v. Merchants Bank* the Court refers to a Massachusetts case, and says:

"In *Stollenwerck v. Thacher,* 115 Mass. 224, there were instructions to the agent to deliver the bill of lading only *on payment* of the draft, and it was held that the special agent thus instructed could not bind his principal by a delivery of the bill without such payment. Nothing was decided that is pertinent to the present case."

And in the case of *Wisconsin Bank v. Bank of British North America,* 21 Upper Canada Queen's Bench Reports, 284, a draft was sent to a collecting bank "for collection"; there were no instructions to hold the documents until the draft was paid.

Counsel also cites the case of *Gregg v. Bank of Columbia,* 72 S. C. 458, 52 S. E. 195, in which the Court said:

"The Chicago owner of the corn had through the drafts and bills of lading invested the Bank of Columbia with legal authority to offer the corn to Miot, whether as purchaser or as agent of the plaintiff is not material. But when he refused to take it the authority of the bank was at an end, and it had no more right to sell the flour to another than if it had never had the drafts."

This language only refers to the ownership existing between the drawer and the Bank of Columbia. The case does not undertake to hold that the

purchaser of the corn would not be protected in buying the same from the Bank of Columbia, which was invested with the legal title, and the Court held that the Bank of Columbia in selling the corn to a third party was liable to the real owner for the highest market value thereof.

So in this case, the Russo-Chinese Bank, as the trial Court correctly stated, had the power to sell the flour, or dispose of it, or handle it in any way that an owner might handle it. It had the power to direct the Steamship Company to take it over and sell it and account to it for the proceeds of the sale, and to assist in the sale, which it did do. But by doing so it converted the flour to its own use—made it its own property and made itself liable for the value thereof at the highest market price to The National Bank of Commerce, and the conversion took place when the Russo-Chinese Bank gave Clarkson & Company permission to sell the flour and authorized the Steamship Company to deliver it to Clarkson & Company. But even if the conversion did not take place at this time, it certainly did take place when the Russo-Chinese Bank permitted Clarkson & Company to sell the flour and divert the proceeds thereof from the defendant. The value of the

flour, as we have heretofore shown, was at least equal to the amount of the draft, and under the authority of *Gregg v. Bank of Columbia* the National Bank of Commerce would have been entitled, had it seen fit, to hold the Russo-Chinese Bank accountable for the value of the flour at the highest market price, if that value exceeded the amount of the draft, and the testimony conclusively shows that it did. And, the evidence showing that the Russo-Chinese Bank had converted this flour to its own use and that it was of a greater value than the amount of the draft, how can it be said with any degree of fairness that the Russo-Chinese Bank was not indebted to The National Bank of Commerce for the amount of the remittance made in November and December, 1904, the recovery of which is sought in this action?

If we are correct in this view, and we think the authorities cited by counsel for plaintiff as well as those cited by ourselves, clearly support it, then it is manifest that any errors that may have been committed by the trial Court as to the duty of the Russo-Chinese Bank to insure, store and guard the flour become wholly immaterial and harmless, and it is wholly immaterial whether the flour was insured or stored, in the light of the fact found by the jury

that the Russo-Chinese Bank did take over the flour and did by its affirmative actions allow it to be appropriated by Clarkson & Company under their promise to account for the proceeds of the sale. And there can be no question but that the legal title to the documents, draft and flour was vested in the Russo-Chinese Bank. To all the world, except The National Bank of Commerce, it was the legal owner of the flour and the documents.

We do not contend that any other relationship than that of principal and agent existed between the defendant and the plaintiff in regard to the handling of the flour in question. The Port Arthur Bank was acting as the collecting agent for the defendant bank and its duty was to exercise due diligence in the handling of the collections; but we do contend that the legal title as distinguished from the equitable title was invested in the Russo-Chinese Bank by virtue of the assignment and transfer of the drafts and documents, and we contend that this is exactly what the Court told the jury. The Court in the same instruction said to the jury:

"It was obligated as an agent to act in good faith to protect the rights of The National Bank of Commerce in the collection of the draft. It was authorized to do whatever was necessary in the man-

ner of incurring expense, which would be chargeable against the property, and to be compensated out of the property in its hands, and it was required to deal with the property in the same way that an intelligent and prudent owner of property would deal with his own property, to act for and in the place of The National Bank of Commerce in handling the business there at Port Arthur as The National Bank of Commerce would have acted if it had been there and in a position to act for itself." (Transcript p. 167).

A fair reading of the entire instruction discloses that the Court clearly made plain to the jury that the relation of principal and agent existed between the plaintiff and the defendant. The jury was not advised that the relation of vendor and vendee existed, and under the authorities heretofore cited by us we think the instruction was entirely according to the principles of law.

On page 47 of his brief counsel for plaintiff states that an invoice accompanied the draft and bill of lading, and that such invoice was in effect a bill of sale.

This Court in the case of *Dows v. National Exchange Bank of Milwaukee*, 91 U. S. 618, 23 L. Ed. 214, says:

"An invoice is not a bill of sale, nor is it evidence of sale. It is a mere detailed statement of the nature, quantity and cost or price of the things invoiced, and it is as appropriate to a bailment as it is to a sale. Hence standing alone it is never regarded as evidence of title."

So that the flour was not in fact sold to Clarkson and the title was not passed to him until it was paid for.

Counsel further contends (Brief, page 60):

"The instructions of the trial court placed upon the Port Arthur branch a responsibility which we assert is entirely foreign and beyond that of a bank handling documents for collection. It would render such banking business impossible because it would thrust upon a collecting bank heavy responsibilities and oblige it to make outlays as to a cargo which might be worthless. In the present case it is apparently claimed that the Port Arthur branch, without any specific request from the Seattle bank and merely by force of its employment, should at once have taken the following steps:

1. To pay the freight.
2. To secure warehouse accommodations.
3. To pay insurance.
4. To place a guard over the flour."

There is no evidence in the record that any freight, warehouse charge or insurance was ever paid by anyone other than Clarkson. Then counsel refers to the printed matter upon the margin of the letter of January 22d, 1904, by the Port Arthur branch, acknowledging receipt of the draft and docu-

ments in regard to the shipment of December 11th, 1903. We have already referred to this letter and explained our views of it. Under the facts in this case it is immaterial for this Court to determine what responsibilities were placed upon the Port Arthur Bank in regard to the storing of the cargo, insuring it, or standing guard over it, for the reason that the bank released the flour and turned it over to Clarkson & Company, according to the uncontradicted testimony, and by a long course of dealings with similar shipments it had repeatedly, without the knowledge of The National Bank of Commerce, released shipments to Clarkson & Company, taking a letter of guaranty, and relying upon Clarkson to sell the flour and account to it for the proceeds.

Before the Port Arthur Bank asked for any specific instructions in its printed letter of January 22d, 1904, it had already assumed to exercise the power it undoubtedly had to control the flour and to exercise acts of dominion and ownership over it, and to turn it over to Clarkson, in disregard of its instructions.

We again refer this Court to the case which we have cited at some length—*Milwaukee National Bank of Wisconsin v. City Bank*, 103 U. S. 668, 26 L. Ed.

417, where the facts are very similar to those involved in this case and where the Court held the collecting bank liable for releasing the cargo by its affirmative act, and defined the duties of a collecting bank under such circumstances as are involved here.

On page 63 of plaintiff's brief it is said:

"As soon as this acceptance was obtained the Port Arthur branch could not dispose of this flour to anyone other than Clarkson & Company for the reason that they retained title simply as security for the payment of the draft. If there was no obligation on the part of the Port Arthur branch to transfer the bills of lading to Clarkson & Company, then there was no consideration for the payment of the draft; *per contra*, if there was such consideration for the draft, then there must have been a corresponding obligation on the part of the Port Arthur branch."

This statement would have been correct had there been no instructions from the Seattle Bank to the Port Arthur Bank not to deliver the documents except upon payment. If we correctly understand counsel his contention simply amounts to an assertion that it was the duty of the Port Arthur branch upon the acceptance of the draft by Clarkston to turn the flour over to him, and if it did not do so there was no obligation upon the part of Clarkson & Company to pay the draft. The position of counsel amounts to the same thing as saying that the Seattle

Bank could not send the draft with documents to be delivered against payment, which is absurd.

It was undoubtedly the duty of the Port Arthur Bank to act as a reasonably prudent owner would have acted under the same circumstances, as the authorities which we have heretofore cited clearly hold. Can it be conceived that The National Bank of Commerce, had it been at Port Arthur at the time of the arrival of this flour and at the time of the acceptance of the draft, would have deliberately waived its security, surrendered its bill of lading, or the flour covered by it, to Clarkson & Company and relied upon Clarkson & Company to pay the draft? The whole course of dealing between the parties shows that the defendant did not rely upon the responsibility of Clarkson but did rely upon the value of its security and that alone, and the Port Arthur Bank knew this and nevertheless released the security upon its own initiative, in disregard of its instructions from the Seattle Bank, and it is immaterial what the Court advised the jury as to the legal or equitable ownership of the flour. The Port Arthur Bank did undertake the collection; did disregard its instructions and released the flour securing the draft and caused a loss to the defendant,

which in this case is shown to be the amount of the draft. By its conversion of the flour the Port Arthur Bank rendered itself liable to the Seattle Bank, and upon the issue of payment the error in the instruction complained of would be wholly immaterial in any event, just as was held by the Circuit Court of Appeals.

III.

On page 68 of plaintiff's brief it is said:

"The Court erred in permitting evidence of a so-called custom concerning the duties of a collecting bank. This applies particularly to the testimony of the witness R. R. Spencer."

This witness states, in answer to certain questions, that the collecting bank was expected to use diligence in taking such steps in regard to storage, insurance, and so forth as they would take were the property their own. We think the evidence of Mr. Spencer referred to in this specification of error was clearly admissible. The plaintiff had already inquired of its witness Clarkson as to the usage and custom of the Port Arthur Bank in handling the drafts drawn on Clarkston & Company by the Centennial Mill Company. The following interrogatory was propounded to Clarkson:

"Q. Where Clarkson & Company were the con-

signees of Centennial flour, and it was discharged by the ship into the 'go-down' or warehouse of Clarkson & Company at Port Arthur, and the method of payment was by draft of the Centennial Mill Company upon Clarkson & Company at Port Arthur, with bill of lading attached, payable at thirty, sixty or ninety days after acceptances, was there any custom or practice at Port Arthur that the bank or person holding the draft after acceptance and until the time of payment had or retained any control over the flour in the 'go-down' or warehouse, and if so, what was the custom?"

Clarkson in answer to this interrogatory explained at considerable length the custom. The plaintiff opened up the question of custom, and certainly the defendant was entitled to introduce evidence to rebut the evidence of custom or usage in regard to the handling of shipments attempted to be shown by the plaintiff. The questions propounded to Spencer may not have been proper cross-examination, but the extent to which a cross-examination shall go is always a matter within the discretion of the trial Court. It was not reversible error for the Court to permit a party to an action to bring out matters upon cross-examination which were clearly material to the issues of the case. The evidence elicited from Spencer tended to show that it was the usage among banks all over the world in handling drafts secured by bills of lading drawn against pay-

ment to exercise control and custody over the shipment. Clearly somebody must exercise custody and control over a shipment of flour such as this during the period of time intervening between the date of the acceptance of the draft and the day of payment. The defendant, had it been present at Port Arthur, would have been obliged to exercise such control. The plaintiff by undertaking the collection of such a draft secured by such a bill of lading, was required to do whatever the principal—were he a prudent man—would probably have done under the circumstances. Now if there is any usage among banks generally to exercise custody of and control over collateral during such intervening period, it seems to us it was proper for the jury to be so advised. And even if there were no such custom or usage it would seem that it was the duty of the agent who had assumed the responsibility of collection to exercise such control. Somebody must exercise this control, and the power was vested in the plaintiff to do so.

But the evidence of Mr. Spencer was wholly immaterial in view of the special finding of the jury and in view of the fact that the Port Arthur Bank did assume dominion and control over the flour on

the date of the acceptance of the draft, and turned the flour over to Clarkson & Company. If there were any error in admitting the testimony of Mr. Spencer it was certainly harmless error in the light of the circumstances surrounding this case.

Objection is made to the inquiry of the witness Davidson as to the practice and custom in regard to handling drafts by the Port Arthur Bank which had been sent to it for collection by the defendant. In answer to the question Davidson testified that the custom of the Russo-Chinese Bank at Port Arthur was to see that the cargo was stored and insured; that the Manager of the Russo-Chinese Bank had frequently come to the office of Clarkson & Company to see if certain cargoes were properly insured and had taken out insurance on such cargoes in some of the companies for which Clarkson acted as agent. Davidson was testifying as to what the Port Arthur Bank did in regard to the control and custody of the goods between the date of the acceptance of the draft and the date of its payment. His evidence shows that all of the drafts drawn by the Centennial Mill Company on Clarkson & Company in favor of the defendant were handled in the same way and that in all cases the bank undertook to take charge

and control of the flour. If his testimony were true and the Port Arthur Bank had exercised over all other shipments dominion and control between the day of acceptance and the day of payment, it would seem that the defendant would have a right to rely upon such authority. But if there were any error in admitting the question, it was harmless for the reason that the bank in this particular instance did take over the flour, did cause it to be surrendered by the Steamship Company to Clarkson & Company, in disregard of its instructions, and by doing so rendered itself liable to the defendant for the full amount of the draft in this case, because, as we have shown, the value of the flour was equal at least to the amount of the draft.

But it is urged in this connection that all of the testimony of Davidson referred to a shipment of flour made by the Pleiades, which arrived at Port Arthur about February 9th, 1904. Davidson said that he did not know whether the flour securing the draft of December 11th, 1903, came on the Pleiades or the Hyades, but he was positive that the shipment contained 35,000 or 40,000 sacks of flour. Short testified that Davidson was mistaken as to the date of the arrival of the flour and that only from 1,500

to 2,000 sacks were delivered by the Pleiades at Port Arthur. As we have heretofore argued, it was entirely a matter for the consideration of the jury. In this connection we again call this Court's attention to the discrepancy in Davidson's testimony and the manner in which it was presented to the jury and the trial Court. (Transcript p. 142).

In regard to all of the errors assigned in respect to the admission of testimony, we again call this Court's attention to its immateriality in the light of the verdict of the jury to the effect that the draft was paid prior to the date of the remittance by the plaintiff to the defendant of the amount sought to be recovered in this action.

On page 81 of plaintiff's brief is discussed the failure of the plaintiff to call as a witness Ofsiankin. The evidence shows that Ofsiankin was the manager of the Port Arthur Bank at the time the draft was accepted and the letter of guaranty was executed (Transcript pp. 107-127-128). It also shows that the time the deposition of plaintiff's witnesses were taken at Vladivostock Ofsiankin was manager of the Vladivostock branch of the Russo-Chinese Bank and was present when the depositions of plaintiff's witnesses were taken. The custom of the Port Arthur

Bank in surrendering the flour covered by documents securing drafts drawn by the Centennial Mill Company and the taking of letters of guaranty or hypothecation from Clarkson & Company was referred to throughout the testimony of Davidson, which was taken at Shanghai, long prior to the trial of this case, and it was certainly known to the plaintiff that the contention of the defendant would be that such letter of hypothecation or guaranty would be one of the important issues in the case. Short testified that Ofsiankin was the sole manager of the bank and the man with whom he always had his dealings in procuring the release of flour covered by bills of lading to secure time drafts. Short also testified as to the high standing of Ofsiankin. It is evident that Ofsiankin was the one witness that plaintiff had in its power to produce, who knew all the facts relating to the shipment in question; and it is always proper to draw adverse inferences from the failure of a litigant to produce a witness who is cognizant of all the facts, and we think the Circuit Court of Appeals was fully justified in characterizing the unexplained absence of Ofsiankin as a significant circumstance as bearing upon the question as to whether or not the draft of December 11th.

1903, had in fact been paid, or the Port Arthur branch had rendered itself liable by the conversion of the flour or by allowing it to be appropriated by Clarkson to his own use, in disregard of the instructions of the defendant to the Port Arthur Bank to deliver the documents and flour only against payment. The inference to be drawn from the absence of this witness undoubtedly is that he was unwilling to testify contrary to the evidence given by the witness Short.

In conclusion we think it is manifest that the special finding of the jury that the draft had been paid prior to the remittances of November and December, 1904, is abundantly supported by the evidence in this case; that the issue was submitted to the jury under proper instructions; and that there was no error in the admission of any testimony bearing upon the question of payment. And this is true, whether the action be regarded as one predicated upon an express contract, or upon one for the repayment of money paid under a mistake of fact; and it is immaterial whether or not errors were made by the trial Court in his instructions, or in the admission of testimony upon other branches of the case, and the Circuit Court of Appeals committed

no error in holding that there was abundant evidence to support the special finding of the jury; and that there was no error in the instruction relating to the subject of payment and no error in the admissibility of any testimony bearing upon that question.

Respectfully submitted,

E. S. McCORD,

J. A. KERR,

Counsel for Respondent.

RUSSO-CHINESE BANK *v.* NATIONAL BANK OF COMMERCE OF SEATTLE, WASHINGTON.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 244. Argued April 13, 14, 1916.—Decided June 5, 1916.

In an action by a bank in Port Arthur to recover money, remitted by it to a bank in Seattle for a draft secured by shipping documents sent to it for collection by the Seattle Bank, and which the Port Arthur Bank declared had not been paid, but for which it remitted on agreement of the Seattle bank to refund in case non-payment was proved, the jury found a general verdict in favor of the Seattle Bank and also a special finding to the effect that the Port Arthur Bank did receive payment for the draft in question; such special finding was based on testimony to effect that the Port Arthur Bank permitted the consignee to take possession of the goods covered by the documents attached to the draft on his agreeing to deposit the proceeds thereof as sold, and an instruction to the effect that such action on the part of a bank receiving a draft for collection constituted a payment in law; judgment being entered thereon and affirmed by the Circuit Court of Appeals, this court reviewing on certorari *held* that:

The fair import of the instructions of the trial judge in their entirety, being that the finding of payment was to be reached only in case the value of the goods was not less than the amount of the draft, there was no error therein.

Where a bank, holding a draft for collection with documents annexed and with instructions to deliver the documents only on payment, allows the drawee to take the goods covered by the documents on his promises to sell and account for proceeds, it amounts to a misappropriation of the property and liability to account for its value immediately arises.

There was no error in charging that the collecting bank became invested with the ownership of the goods and could not be excused from obligation to account by declaring that the goods had disappeared without its knowledge, the charge not being to effect that the relation of vendor and vendee did exist, but that the relation of principal and agent did exist, and, as such agent, the col-

lecting bank was obligated to act in good faith to protect the rights of the owner of the draft.

The special finding being supported by adequate evidence is controlling.

Even if a bank, sending a draft for collection, suffers no loss on account of its guaranty from the original owner, it may, in view of its relation to commercial paper, demand, as principal, an accounting from its correspondent, and resist an action to recover back the money which it received upon the draft.

206 Fed. Rep. 646, affirmed.

THE facts, which involve questions relating to a transaction between two banks, regarding drafts and documents annexed thereto, are stated in the opinion.

Mr. Warren Gregory, with whom *Mr. W. H. Chickering* and *Mr. George H. Whipple* were on the brief, for petitioner:

The instruction that permission given Clarkson & Co. to take the flour constituted a payment of the draft is manifestly erroneous.

The court in declaring that certain acts would constitute payment of the draft practically directed a special verdict.

The trial court proceeded upon the assumption that there was a novation; and the pleadings do not count on a novation nor was the case tried on the theory of novation.

The conduct of the parties is inconsistent with such theory.

If the Port Arthur branch did, contrary to instructions, permit Clarkson to take over the flour, it may have been responsible to the extent of the security released, but the jury is entitled to pass upon the question as to the value of the flour taken and there is no evidence that any of the flour was actually taken.

The only fair intendment of the instruction leads to an absurdity.

The trial court had in mind that it was not the release of the security that would pay the debt *pro tanto*, but the application of the proceeds.

The error of the trial court was only emphasized by another instruction given and the special verdict did not cure the error, but was authority for the special verdict.

The instruction that the collecting bank became invested with title and ownership of the flour, and its obligation in this regard, is erroneous. The refusal to charge that the duty of collecting bank was one of agent was error.

The Port Arthur branch was not the owner of the flour but its relationship was principal and agent, as is shown by the documents.

The instructions of the trial court placed on the Port Arthur bank the same obligations as if it had agreed to buy the flour from the Seattle bank.

The instructions of the trial court would place on the Port Arthur branch a responsibility foreign to banks handling documents for collection.

The draft in question was accepted by Clarkson & Co., and they became the principal debtors.

The court erred in permitting evidence of a so-called custom concerning the duties of a collecting bank.

Usage or custom cannot be invoked in contradiction of an express contract.

Certain of the testimony of witnesses Davidson and Short was prejudicial to petitioner.

The respondent has not been damaged by any acts of negligence on the part of petitioner.

In support of these contentions see *Alden* v. *Camden Anchor-Rockland Mach.*, 78 Atl. Rep. 977; *American Thresherman* v. *Motor Co.*, 141 N. W. Rep. 210; *Armour & Co.* v. *Russell*, 144 Fed. Rep. 614–616; *Atchison, T. & S. F. Ry.* v. *McClurg*, 59 Fed. Rep. 860; *Balbach* v. *Frelinghuysen*, 15 Fed. Rep. 675; *Bancroft* v. *Bancroft*, 110 California, 374; *Bank* v. *Monongahela Bank*, 126 Fed. Rep. 436; *Barton Seed Co.* v. *Mercantile Bank*, 160 S. W. Rep. 848; *Boston & Albany R. R.* v. *O'Reilly*, 158 U. S. 334; *Charles* v. *Carter*, 36 S. W. Rep. 396; *Commercial Bank* v.

First State Bank, 153 S. W. Rep. 1175; *Commercial Nat. Bank* v. *Armstrong*, 39 Fed. Rep. 684; *Deery* v. *Cray*, 5 Wall. 795; *Dickerson* v. *Wason*, 47 N. Y. 439; *Elm Lumber Co.* v. *Childerhose*, 83 S. E. Rep. 22; *Gregg* v. *Bank of Columbia*, 52 S. E. Rep. 195; *Hambro* v. *Casey*, 110 U. S. 216; *Hunt* v. *Nevers*, 32 Massachusetts, 504; *Hyde* v. *Booraem*, 16 Pet. 169; *Ladd Bank* v. *Commercial Bank*, 130 Pac. Rep. 975; *LeCoux* v. *Eden*, 2 Doug. 594; *Midland Nat. Bank* v. *Brightwell*, 49 S. W. Rep. 994; *Nat. Bank* v. *Merchants' Bank*, 91 U. S. 92; *Nebraska &c.* v. *First Nat. Bank*, 110 N. W. Rep. 1019; *Pac. Brokerage Co.* v. *Rushfeldt*, 171 S. W. Rep. 976; *Scott* v. *Ocean Bank*, 23 N. Y. 289; *Second Nat. Bank* v. *Bank of Alma*, 138 S. W. Rep. 472; *Smith* v. *Nat. Bank*, 191 Fed. Rep. 226; *Tyson* v. *Western Nat. Bank*, 26 Atl. Rep. 520; *Union Bank* v. *Stafford*, 12 How. 327; *Warren* v. *Suffolk Bank*, 10 Cushing, 582; *Wharton* v. *Walker*, 4 B. & C. 164; *Wisconsin Bank* v. *Bank of North America*, 21 Upper Canada Rep. 284; 21 Amer. & Eng. Enc. of Law, p. 661; Grant on Banking, 6th ed., p. 53; Morse on Banking, 4th ed., §§ 217, 223; Randolph on Commercial Paper, 2d ed., § 795; Cal. Civil Code, § 1531.

Mr. E. S. McCord, with whom *Mr. J. A. Kerr* was on the brief, for respondent.

Mr. Justice Hughes delivered the opinion of the court.

The Russo-Chinese Bank brought this action to recover back money which it had paid to the National Bank of Commerce of Seattle. Judgment of non-suit was entered on the first trial and was reversed by the Circuit Court of Appeals. 187 Fed. Rep. 80. On the second trial, there was a verdict for the defendant and the judgment entered accordingly was affirmed. 206 Fed. Rep. 646. The case comes here on certiorari.

The facts are these: In December, 1903, the Centennial Mill Company, of Seattle, shipped by the steamship 'Hyades' of the 'Puget Sound-Oriental Line' 35,312 quarter sacks of flour to be transported to Port Arthur, or Dalny, and to be there delivered "unto shipper's order or to his or their assigns (Notify Clarkson & Co.)." In accordance with the usual course of business the Centennial Mill Company drew its draft, dated December 11, 1903, on Clarkson & Co., for $36,194.80, payable ninety days after sight, to the order of the National Bank of Commerce (with exchange and collection charges) and, attaching thereto the original and duplicate of the bill of lading for the shipment above described, (which was endorsed in blank) the policy of insurance, and bill of sale to Clarkson & Co., delivered the draft of the National Bank of Commerce, of Seattle, which paid the amount of the draft to the Mill Company. This bank then forwarded the draft, with the documents, to the Port Arthur branch of the Russo-Chinese Bank for collection, stating in the letter of transmittal: "Documents are to be delivered on payment." The letter, with the draft and documents, was received on January 22, 1904.[1] In acknowledging receipt, the Russo-Chinese Bank used the usual form of letter which stated that specific instructions must be given concerning disposition of bills and documents, and storage of goods, in case the draft were dishonored. No such instructions were given. The draft was presented for acceptance on January 23, 1904, and was accepted on January 30, 1904 by Clarkson & Co., and the Seattle bank was notified accordingly. The acceptance fixed April 30, 1904, as the due date, according to the tenor of the draft, and on the expiration of two days' grace allowed by the Russian law it was protested on May 3, 1904. There was evidence that the draft with

[1] For convenience, we give the dates 'New Style.'

deed of protest was mailed to the Seattle bank on May 26, 1904; and there was counter testimony that it never was received.

The Russo-Japanese War was formally declared on February 10, 1904. From February 9 there was a stringent water blockade of Port Arthur and about May 3 the investment was made complete by the Japanese land forces. Port Arthur fell on January 2, 1905, and thereupon the Japanese authorities took possession of all the books and documents of the Russo-Chinese Bank at Port Arthur; these were retained until March, 1906, when they were returned to the bank and taken to its home office at St. Petersburg.

Clarkson & Co., an importing firm having its principal place of business at Vladivostok and a branch office at Port Arthur, were also the agents at the latter place of the steamship company which carried the flour. On April 29, 1904, the Port Arthur branch of the Russo-Chinese Bank wrote to the Shanghai branch of the bank (in answer to an inquiry requested by a representative of the Centennial Mill Company) that the bank had "all shipping documents" and added: "The flour relative to the first three bills" (including the one in question) "is in the hands of Clarkson & Co. and has been sold by them. They promised to take up the bills as soon as they get the money of their sale . . . Bill No. 1559/7035" (that is, the draft here involved) "is due tomorrow and shall be protested if not paid." It was further stated that the fact that Clarkson & Co. had obtained possession of the goods, although the bill of lading was held by the bank, was due to their being the steamship agents, and could not be prevented. On July 7, 1904, the Seattle bank wrote to the Russo-Chinese Bank at St. Petersburg that Clarkson had advised the drawer that this draft, and others, had been paid before maturity. The Russo-Chinese Bank replied, in substance, that it was not in a

position to trace the matter but would investigate it as soon as possible. There was further correspondence in which the Seattle bank set forth its information as to the payment of the draft and the Russo-Chinese Bank reiterated its inability to ascertain the facts. Finally, in response to the demand of the Seattle bank for the return of the bill of lading attached to the draft, or a remittance of its amount, the Russo-Chinese Bank, St. Petersburg, under date of November 9, 1904, forwarded to the Seattle bank a cheque for $36,013.70 (being $36,194.80 the face of the draft less commission and charges) and added: "It remains, of course, however understood that in case your above remittance proves not to have been paid for by Clarkson & Co. you are held responsible to refund the amount of our today's cheque." The Seattle bank (December 5) acknowledged receipt pointing out that a balance of $2,298.49 was still needed to make payment of principal and interest in full, and stating: "We on our part agree upon return to us of both sets of bills, showing that the draft has not been paid, to reimburse you in the sum paid us, provided, that we were in no wise injured by the fact that your Port Arthur Branch has indefinitely held the bills after their maturity, at which time they could have been returned to us and we could have collected from the Steamship Company." On December 29, 1904, the Russo-Chinese Bank, St. Petersburg, enclosed cheque for the balance requested, and said: "It remains understood that in case your above remittance proves not to have been paid, you declare yourselves ready to refund us these $2,298.49 with the $36,013.70, sent on 27/9 November plus accrued interest." And in reply the Seattle bank agreed "that guarantee contained in our letter of December 5 shall also cover this amount."

When the Russo-Chinese Bank obtained from the Japanese authorities the books and documents, it ascertained that the draft in question had been protested for non-

payment, and had been mailed to the Seattle bank. Thereupon, on June 27, 1906, the Russo-Chinese Bank demanded the refunding of the money paid to cover the draft. The demand was refused and this action was brought.

It was alleged in the complaint that the payment to the Seattle bank had been made upon condition that "if it should thereafter be ascertained that said draft had not been paid," the money should be refunded, and that there had been no payment in fact. The defendant denied that the condition was as stated and alleged that it had agreed to reimburse the plaintiff upon the return 'of both sets of bills' and a showing that the draft 'had not been paid,' provided the defendant was in no wise injured by the negligence of the plaintiff in the performance of its duties. It was further averred, among other things, that the draft had been paid in full by Clarkson & Co.; that it was the duty of the plaintiff not to permit the flour represented by the bill of lading to be appropriated by Clarkson & Co.; and that if the proceeds of the sale of the flour were not applied to the payment of the draft the failure was due to the plaintiff's carelessness and breach of duty. The plaintiff in its reply denied these averments and alleged affirmatively that Clarkson & Co. were the agents of the steamship company and that it was well known to the defendant that upon arrival the flour would be delivered into their keeping as such agents whether the draft was paid or not, and that the appropriation of the flour by them before payment was a matter not within plaintiff's control.

The judgment of non-suit on the first trial, because of a failure to show the return of the draft and accompanying documents and thus to prove the breach of an express promise, was reversed upon the ground that the complaint stated a cause of action upon an implied agreement to restore money paid under mistake of fact. 187 Fed. Rep., p. 86.

On the second trial the jury found a general verdict in favor of the defendant and also returned a special finding as follows:

"We . . . find that the Port Arthur Branch of the Russo-Chinese Bank did receive the payment of the draft dated December 11, 1903, on account of which the plaintiff made the remittance to the defendant alleged in the complaint."

The Court of Appeals held that, notwithstanding the protest of the draft and the other evidence introduced by the plaintiff to show that it had not been paid, this special finding had sufficient support. In its succinct review of the evidence the court said, 206 Fed. Rep. 651:

"The flour in question was carried to Port Arthur by the ship Hyades, which reached there about the middle of January, 1904. The evidence also shows that Clarkson & Co. were large customers of the bank. The succeeding ship of the steamship company, also carrying flour among other things, reached Port Arthur about the 7th of February, 1904. Short" (assistant manager of Clarkson & Co. until, as he said, February 4, 1904) "testified, among other things, that when the Hyades arrived with the 35,312 quarter sacks of flour in question, there were but from 6,000 to 8,000 sacks in Clarkson & Co.'s warehouse, and that when that shipment arrived he went to the Port Arthur bank on behalf of Clarkson & Co. to accept the draft drawn for the purchase price of it, and did so; that when he accepted the draft Mr. Ofsiankin," (manager of the Russo-Chinese Bank at Port Arthur) "on behalf of the bank, authorized Clarkson & Co. to take immediate possession of the flour and sell it, and that he (Short) on behalf of that firm gave the bank what he designates as a 'letter of guaranty,' and what Davidson" (then, as he testified, manager of Clarkson & Co. at Port Arthur) "in his deposition designates as one of 'hypothecation,' recognizing the flour as the property of the bank until paid for, and

agreeing to pay over to the bank the proceeds thereof until full payment was made; that the letter was 'the regular form of bank guaranty; it was a printed form,' said the witness. And both Short and Davidson testified that what was done in the matter of the shipment here in question was in accordance with a long-established custom between the Port Arthur bank and Clarkson & Co.; Short testifying that: 'From the year 1900 the same rule existed. We always gave the bank a letter of guaranty against—a letter of guaranty to take delivery of the cargo, and the cargo belonged to them until it was paid for, and we sold it out and deposited the money in the bank from time to time as Clarkson & Co. got it in.'—Davidson in his deposition corroborates the testimony of Short in that regard,— . . . Short testified that upon the acceptance by Clarkson & Co. of the draft in question, and the delivery by that firm to the Port Arthur bank of the documents mentioned, Clarkson & Co. took possession of the 35,312 quarter sacks of flour, and that they thereupon commenced selling it, and paying into the bank the proceeds thereof, is a fair inference from his testimony, as well as that of Davidson.—It appears from the latter's testimony that by reason of orders of the Russian military authorities he was compelled to leave Port Arthur, and did so on the 17th of February, 1904." After referring to the fact that Davidson was evidently confident that the steamer that brought the flour was the 'Pleiades' (the steamer that arrived in February after the 'Hyades') the court continued, p. 652:—"but the flour itself, the witness distinctly testified, was sold by him before leaving Port Arthur to the firm of Ginsburg & Co., which he testified was a large Russian firm doing an extensive business with the Port Arthur bank, and with its principal place of business at that place, and which sale he testified he had to make in order to protect Clarkson & Co. against the war conditions then prevailing. His testimony is, in

part, that he arranged with Ginsburg & Co. to pay a part of the money for which he sold the flour into the Port Arthur bank, and to take a draft from that company on Shanghai in his favor, which he intended to pay into Clarkson & Co.'s branch at that place, and that he took the head of the firm, Ginsburg, to the Port Arthur bank, and explained to the manager of that bank the terms of the sale, to which he agreed.—Short testified that the Pleiades arrived at Port Arthur about the 7th of February, and that he himself left there on board of that vessel, and that not more than 1,500 or 2,000 sacks of flour were landed at Port Arthur from that ship, so that the jury might well have concluded that the 35,000 or 40,000 sacks of flour which Davidson thought were brought by the Pleiades was the consignment of flour that the Hyades carried to that port a few weeks before. As a matter of course that, and all other inconsistencies in the testimony of the various witnesses, as well as their veracity, were matters for the determination of the jury, in the light of all of the facts and circumstances of the case. Moreover, there was testimony tending to show that from the 1st of January, 1904, to November 23d of the same year, Clarkson & Co. paid into the Port Arthur bank 126,928 rubles and 97 kopeks." 206 Fed. Rep., pp. 651–653.

We agree with the Court of Appeals that the special finding of the jury was adequately supported. Error is assigned with respect to the following instruction to the jury:

"If you find from the evidence in this case that plaintiff permitted Clarkson Company to take over the flour under such an arrangement as the defendant claims with the stipulation that the plaintiff was the owner of the flour and with the agreement that Clarkson & Company would account to the plaintiff for the proceeds of the sale of the flour, then I instruct you that such action on the part of the plaintiff constitutes in law a payment of the draft in ques-

tion and the plaintiff cannot recover and your verdict must be for the defendant."

It is said by the petitioner that "if we assume that the Port Arthur branch did, contrary to its instructions, permit Clarkson to take over the flour, then to the extent of the value of the security that was thereby released it may have been responsible." But, it is argued that "although the bank did without warrant release the security," still no damage resulted to the Seattle bank if Clarkson & Co. were in fact able to pay their draft, and that there was abundant evidence that Clarkson's financial standing in Port Arthur at this time was good; and that in any event the debt could not be deemed to be paid to a greater extent than the value of the property. The trial court, it is insisted, in effect directed a finding of payment, if the jury found that the agreement was made as described, regardless of this value.

This criticism of the instruction fails, we think, to take proper account of its context. Immediately following the words quoted, the court said:

"It is a general rule of law that where collateral security is received for a debt with power to convert the security into money, this is specifically applicable to the payment of such debt; the same person being the party to pay and receive, no act is necessary and the law makes the application. If the proceeds equal or exceed the amount of the debt it is *de facto* paid; no action would lie for it, and proof of these facts would support the defense of payment. And if you find from the evidence in this case that the plaintiff did consent to Clarkson taking over the flour in question and consented to the sale of the same by Clarkson & Company, and then Clarkson & Company sold the flour in question and paid over the proceeds thereof to the plaintiff, then such payment of the proceeds of the sale of such flour to the plaintiff operated as a payment of the draft in question,—provided the proceeds

of the sale of the flour equaled the amount of the draft; and if such proceeds did not equal or exceed the amount of the debt then it was a payment *pro tanto*—that is a payment of so much of the said draft as the proceeds of the sale of the flour would pay of the same; and this is the law, notwithstanding the fact that plaintiff may have received the proceeds of the sale of said flour and placed the same to the credit of Clarkson & Company in its bank, and permitted Clarkson & Company to use said funds for other purposes."

In this, the trial judge made his meaning sufficiently clear. If the proceeds of the sale under the agreement were to be payment only if they 'equaled the amount of the draft' and otherwise were to be 'payment *pro tanto*,' plainly the agreement itself was not to be treated as constituting payment regardless of the value of the flour. Taking the instructions on this point in their entirety we think that their fair import was that the finding of payment in consequence of the stated arrangement was to be reached only in case the value of the flour was not less than the amount of the draft.

Moreover, the record does not disclose a controversy as to the value of the flour. The evidence as to this amply supported a finding that the flour was at least worth the amount of the draft, and indeed it could not be said that a different conclusion would have had adequate support in the proof. Mr. Friedburg, officer of the Russo-Chinese Bank, testified that he did not know 'the price of the flour,' but that so far as he knew "during the siege of Port Arthur the price of flour was a little higher than before the outbreak of the war, but there was a lot of flour in the go-downs of the Government and no scarcity was felt of it." Mr. Clarkson testified, referring to the Ginsburg sale: "The first I heard was that the flour had been sold at two roubles a sack. I firmly believe at that time, that as war had broken out, the flour that

was in Port Arthur at the time was worth fully Rbls. 3.00 a sack, consequently I considered that any sale made at Rbls. 2. was at least one rouble below the market value. To the best of my knowledge and belief the selling price before hostilities commenced was from Rbls. 2.50 to Rbls. 2.60 a sack. . . . Acting under instructions from me, the bank in Port Arthur refused to let Ginsburg & Company have the flour at Rbls. 2.00, whereupon Ginsburg & Company agreed to pay Rbls. 2.40." Mr. Short when asked 'the market price of the flour' at the time he left said "it was selling from two forty to two sixty-five roubles a sack." Mr. Davidson testified that there was "no market price of flour at that time," but when asked whether "there were not two separate bills of sale" made by him to Ginsburg & Company for that flour, "one at 2. roubles and the other at 2.40 roubles" he answered that it was "quite true there were two prices" arranged by him and that "the lower price was sufficient to meet the draft." He added: "I made the sale to Ginsburg & Company at what I considered a fair market value under the circumstances, namely, that I had to leave Port Arthur and that there was no one there I considered eligible to succeed me. The profit was 20 to 25 per cent., as near as I can remember." It cannot be said that the evidence warranted a finding that the value of the flour was less than the amount of the draft.

The Russo-Chinese Bank received the draft, with documents attached, for collection. It was instructed that "Documents are to be delivered on payment." It was on these terms that it was entrusted with the bill of lading, endorsed in blank, which represented the flour. It was its plain duty not to permit Clarkson & Co., upon whom the draft was drawn, to have the control and disposition of the flour until the draft was paid. See *National Bank* v. *City Bank*, 103 U. S. 668, 670, 671. It is no answer to say that Clarkson & Co. were the agents of the steamship

company, for, while they might be able to obtain custody of the flour, it would only be in their capacity as such agents and without the right of disposition. Nor was the case altered by the acceptance of the draft, for the condition attached to the delivery of the flour with the *jus disponendi* was payment, not acceptance. If, in these circumstances, the bank entered into an agreement with Clarkson & Co., as was testified, that the latter were to take over the flour and sell it, promising to account for the proceeds, this was manifestly a misappropriation of the property and there arose in consequence liability to account for its value. This action was brought by the Russo-Chinese Bank to recover money which it had paid to the Seattle bank, and, with respect neither to the express promise to refund nor the promise implied in law, can it be said that the plaintiff was entitled to succeed if at the time of the payment to the Seattle bank it paid merely what it owed. There is no theory which permits it to recover, save that it paid under a mistake of fact, that is, that upon the actual facts it was not liable to make the payment it did make. If, however, it appeared that the value of the flour was equal to the amount of the draft, and it was found that the bank contrary to its instructions had permitted Clarkson & Co. to take and dispose of the flour, it would necessarily follow that the Russo-Chinese Bank was accountable to the Seattle bank to the amount of the draft and was in the same position, so far as the right of the Seattle bank against it was concerned, as if it had received the avails of the draft. It could not by an agreement in violation of its duty, invest Clarkson & Co. with the right of disposition, without accountability. The instruction, to which we have referred, affords no ground for reversal.

Error is also assigned with respect to the instruction to the jury that the Russo-Chinese Bank became invested with the title and ownership of the flour and that it could

not be excused from an obligation to account by saying that the flour had disappeared without its knowledge. It is argued that the relation between the banks was that of principal and agent, not of vendor and vendee; that it took the draft for collection. But the charge, as we view it, was not to the effect that the relation of vendor and vendee was created, but on the contrary it was distinctly stated to the jury that the Russo-Chinese Bank 'was obligated as an agent to act in good faith and protect the rights of the National Bank of Commerce in the collection of the draft,' and that as 'the agent' for the owner it 'was obligated to account for the amount of the draft, to account for the security which the bill of lading constituted.' In view of the special finding that the draft had been paid it is not necessary to inquire as to whether there would otherwise have been liability on the part of the plaintiff because of a failure to exercise reasonable care. The special finding, supported by adequate evidence, was based under the instructions of the court upon the transaction with Clarkson & Co. to which we have referred, and it must be deemed controlling. We find no instruction with reference to that transaction, or its legal effect if found to be as testified, which was prejudicial to the plaintiff.

Complaint is also made with respect to certain requests for instructions and rulings on the admission of evidence, but they are wholly without merit and it is unnecessary to review them. It is said that the Seattle bank suffered no loss because it had a guaranty from the Centennial Mill Company, but the Seattle bank in view of its relation to the commercial paper involved was entitled to demand an accounting from its correspondent, and on the same ground to resist this action for the recovery back of the money which it had received upon the draft.

As we discover no error in the record, the judgment must be affirmed.

Judgment affirmed.